IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 635 of 2004
With
CRIMINAL APPEAL No. 885 of 2004
With
CRIMINAL APPEAL No. 912 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

6 Only Paragraph Nos.1 to 15 and Paragraph Nos.41 to 68 to be reported.

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SALIM SHAMSUDDIN SHAIKH & ORS. - Appellants
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :

CRIMINAL APPEAL NO.635 OF 2004

MR.S.V.RAJU, SENIOR ADVOCATE FOR MR. CHETAN K PANDYA AND MR HIMANSHU J MEHTA; FOR APPELLANTS NO.2 (ORG. ACCUSED NO.2)

CRIMINAL APPEAL NO.885 OF 2004

MR.S.V.RAJU, SENIOR ADVOCATE FOR MR.B.C.DAVE FOR APPELLANTS NO.1 (ORG. ACCUSED NO.1);

CRIMINAL APPEAL NO.912 OF 2004

MR.J.M.PANCHAL, LD. ADVOCATE WITH MR.K.J.PANCHAL, FOR APPELLANT NO.4(ORG. ACCUSED NO.4)

MS.PANDIT, ADDL. PUBLIC PROSECUTOR for Opponent-State of Gujarat

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 11/09/2007

CAV JUDGMENT

These three appeals are preferred under the provisions of Section 374 read with Section 386 of the Code of Criminal Procedure, challenging the legality and validity of the order of conviction and sentence passed by the learned City Sessions Judge, Court No.11, Ahmedabad City disposing two Sessions Case No.46 of 1999 and Sessions Case No.190 of 2000, on 23rd April, 2004 whereby the learned trial Judge has held the accused Nos.1 and 2 guilty of the charge of offence punishable under Section 25 (1) (a) read with Section 35 of the Arms Act and sentenced him to undergo three years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default thereof to undergo three months rigorous imprisonment and the accused Nos.1, 2 and 4 have been held guilty of the charge of offence punishable under Section 25 (1AA) read with Section 35 of the Arms Act and sentenced them to undergo seven years rigorous

imprisonment and to pay a fine of Rs.10,000/- each and in default of making payment of fine to undergo six months rigorous imprisonment. The leaned trial Judge has ordered that all the sentences shall run concurrently with benefit under Section 428 of the Code of Criminal Procedure. The appellant of Criminal Appeal No.635 of 2004 is original accused No.2, appellant of Criminal Appeal No.885 of 2004 is original accused No.1 and the appellant of Criminal Appeal No.912 of 2004 is original accused No.4.

2. Total nine accused persons were arrested and charge-sheeted by the Police for the offences punishable under Section 120 (B) of the Indian Penal code and under Section 25 (1) (a) and / or 25 (1AA) read with Section 35 of the Arms Act. On account of piecemeal arrest, the Police filed different charge-sheets against the accused persons and obviously therefore they were committed to the Court of Sessions accordingly.

AS such five Sessions Cases were registered for one said offence. However, accused of Sessions Case No.309 of 1999, Sessions Case No.34 of 1999 and Sessions Case No.8 of 2000 came to be discharged by the learned City Sessions Judge. Out of nine accused persons, five accused persons were discharged and remaining four accused persons have been tried by both these Sessions Case being Sessions Case No.46 of 1999 and Sessions Case No.190 of 2000. Whereas, the original accused No.3-Abdul Mazid Baloch has been acquitted by the impugned judgment and order and the Court is informed by the learned Counsel appearing for the parties that the State has not preferred any appeal in respect of acquittal of original accused No.3. So, the judgment and order under challenge obviously shall have to be evaluated in the background of the evidence led by prosecution and submissions made in reference to the charge leveled against the three accused-appellants. All the three appeals challenging the common judgment and order of conviction and

sentence are dealt with jointly and are disposed of by this common judgment. For the sake convenience the appellants have been referred as original accused No.1, 2 and 4 respectively hereinafter.

3. The legality and validity of the judgment and order is assailed on various grounds in all the three appeals and Mr.S.V.Raju, learned Counsel appearing for the original accused Nos.1 and 2 and Mr.J.M.Panchal, learned Counsel appearing for the original accused No.4 have taken me through the grounds mentioned in the memo of respective appeals and have made their detailed submissions. In the same way, the learned A.P.P., Ms.Pandit, has attempted to show that ultimate finding recorded by the learned trial Judge is based on sound reasons and no illegality or perversity is found in the finding arrived at by the learned trial Judge. According to her the evidence led by prosecution has been correctly appreciated keeping in mind the well

established principles of law regarding appreciation of evidence.

4. Firstly, it is necessary for the court to state the case of prosecution in brief, which is reflected in charge (Exh.69) and relevant part of the charge reads as under.

1. “A complaint was lodged against you accused persons that on 5/2/1993 or thereabout you accused persons for doing crime activities in the city of Ahmedabad were storing, possessing, selling and transporting ammunitions and thereby committed offence punishable under Section 120 (B) of the Indian Penal Code.
2. Further it is alleged in the complaint that in furtherance to the conspiracy one Maruti Car, bearing Registration No.GCB-122 under your custody, containing six cartridges of . 455 Revolver, with a knowledge of selling and transporting the same, was recovered from your possession and thereby you accused persons committed offence punishable under Section 25 (1) (a) and 35 of the Arms Act read with Section 120 (B) of the Indian Penal Code.
3. It is further alleged in the complaint that you accused persons, in the Bungalow No.19 of

Satyam Co-operative Housing Society Ltd., of Shahpur Area, which is under your possession, intentionally possessed prohibited ammunitions, i.e., one A.K. 47 Rifle and cartridges for selling and transporting it and thereby committed offence punishable under Sections 25 (1) (a), 25 (1AA) and under Section 35 of the Arms Act read with Section 120 (B) of the Indian Penal Code."

4.1 The defence of original accused No.1 is of denial. However, the defence of original accused No.2 is defence of qualified denial with explanation that has been discussed by the learned trial Judge mainly in paragraph No.9 (Page No.258 to 259). The defence of original accused No.4 is of "false implication" and also of inadequacy of legal evidence to link the accused No.4 with the crime.

5. It is alleged that at about 7:00 p.m. on 4th February, 1993 one Constable of Boarder Wing -Manuji Rajput was on his duty in the Dariapur Area and on a chowky erected with a tent, one blue colour, Maruti Car without any number-plate

coming from Dariapur Darwaja with excessive speed and therefore it was intercepted. He found Noor Mohmmed-original accused No.1-the driver of the car in a drunken condition, driving the car rashly. At that time, the Police Inspector, Mr.Zala, co-incidentally had reached there and Mr.Rajput had handed over the custody of said Maruti Car, as well as, accused No.1-Noor Mohmmed to Mr.Zala. Mr.Zala arrested Noor Mohmmed for the offence punishable under Section 279 of the Indian Penal Code and under Section 185 of the Motor Vehicles Act and thereafter the crime was registered with Dariapur Police Station vide C.R.No.I-50 of 1993. Noor Mohmmed alongwith Maruti Car was sent to the Police Station.

6. According to prosecution P.W.No.2, Mr.Novel Vovel Parmar, who was discharging his duty as Police Inspector, Dariapur Police Station had received secret information that one Noor Mohmmed alongwith original accused No.3-Abdul Wahab is indulging in the business of

transportation of arms and ammunitions illegally and he has kept some cartridges in his car. When Mr.Parmar, P.I., found that this very person has been arrested and the car is also with Dariapur Police Station in one another crime, he called two Panchas prior to noon on 5/2/1993 and searched the car in presence of original accused No.1 and during that search the accused No.1 had taken out six live cartridges from a cavity on the rear seat created near the speaker of the car. These cartridges were found with a particular detail, that is, Eley (London) of .455 calibers. The cartridges were seized and Mr.Parmar gave complaint. Thereafter, he entrusted the investigation to Mr.Pachal, Police Sub Inspector of the City Crime. However, he also continued with him during the investigation. It is the say of prosecution that during interrogation, the Police Officers got some clue from accused No.1 and the Police was able to reach to Bungalow No.19 of Satyam Society occupied by Mohmeed Rafik Sheikh original accused

No.4. In presence of two Panchas, the Police Officers had entered into that Bungalow. The original accused No.1 had accompanied during search. The bungalow was locked from outside and they entered into the Bungalow after opening a door covered with an iron grill and from cellar referred in the impugned judgment as “Bhoyra” the search party found three plastic bags and three jute bags. One plastic bag was containing an A.K.47 Rifle, three country-made pistols, live cartridges, magazines and about 159 live cartridges of various types and 18 used cartridges. Whereas, three jute bags were containing silver wire weighing of about 122.5 Killo Grams. All these muddamal were recovered. After seizure of the muddamal in presence of the Panchas, it was taken to the Police Station and during investigation the Police found that Maruti Car without number-plate was bearing registration No.GCB-122 and original accused No.2-Salim Samsuddin Sheikh is the owner of that car. The original accused No.2 ultimately came to be

arrested by P.S.I. Shri Panchal (P.W.No.10) and looking to the gravity of the offence, Mr.Panchal has handed over the investigation to Mr.Zala. Mr.Zala forwarded the seized muddamal to F.S.L. Accused No.2 meanwhile prayed that, being the owner of the car, possession of that car be handed over to him and under the orders of the Court, the possession of the car was handed over to accused No.2 as an interim arrangement in exercise of powers vested with the Court under the provisions of Section 454 of the Code of Criminal Procedure.

7. The original accused Nos.1 and 2 were charge-sheeted. However, accused No.3 was absconding and steps under Section 70 of the Criminal Procedure Code was undertaken so that warrant under Section 70 can be issued. Thereafter, the investigation was handed over to Police Inspector, Mr.Brahmbhatt, but before he could take any action, further investigation was handed over to Mr.Baburav Patil, A.C.P.,

(P.W.No.12). Meanwhile the original accused Nos.3 and 4 were arrested and they were charge-sheeted.

8. The Counsel appearing for the parties as well as learned A.P.P., has taken this Court through the evidence of number of witnesses. While appreciating the evidence, the learned trial Judge has divided them into different categories which is reflected in paragraph 7 of the judgment. The details of the oral as well as documentary evidence considered by the learned trail Judge is mentioned herein which would ultimately help the Court at the time of discussion.

A-1 (Oral Evidence)

Sr.No.	No. of Witness	Exh	Name	Particular
1.	P. W. No.2	93	Novel Vovel Parmar	Police Inspector, Dariapur Police Station. Complainant
2.	P. W. No.3	98	Chandansinh Naransinh Rajput	P.S.I. Dariapur Police Station.
3.	P. W. No.4	99	Manuji Kanuji Rajput	Constable of Boarder Wing
4.	P. W. No.10	108	Jayanti Hiralal Panchal	P.S.I. Dariapur Police Station. Investigating Officer

Sr.No.	No. of Witness	Exh	Name	Particular
5.	P. W. No.11	119	Lalubha Gopalsinh Zala	P.S.I. Dariapur Police Station. Investigating Officer
6.	P. W. No.12	121	Baburav Ramchandra Patil	Assistant Police Commissioner, Investigating Officer.

A-2 (Other Witnesses)

Sr.No.	No. of Witness	Exh.	Name	Particular
1.	P. W. No.5	100	Kamlesh Kantilal Thakar	Inspector, A.M.C.
2.	P. W. No.6	102	Kantilal Shivram Patel	Inspector, A.M.C.
3.	P. W. No.7	103	Bhupendra Nandlal Shah	Inspector, A.M.C.
4.	P. W. No.8	104	Samsuddin Hussainmiyan Sheikh	Father of accused No.2.

A-3 (Panch Witness)

Sr.No.	No. of Witness	Exh.	Name	Particular
1.	P. W. No.1	75	Pankajkumar Gandalal Chauhan	Panch to the recovery of cartridges from the Maruti Fronty Car, so also, the Panch to recovery of muddamal recovered from the Satyam Society.

B-Documentary Evidence

Sr.No.	Exh.	Particular	Date
1.	76	Panchnama of recovery of cartridges from the Maruti Car	05/02/1993
2.	77	Panchnama regarding recovery of weapons from the Bungalow No.19, Satyam Society.	05/02/1993
3.	79 to 91	Slip bearing signatures of Panch and Police Inspector, Shri Parmar.	05/02/1993
4.	94	Complaint given by Mr.Novel Parmar, Police Inspector	05/02/1993
5.	101	Registration Form regarding assessment and tax collection of Ahmedabad Municipal Corporation.	19/02/1993
6.	105	Sanction for prosecution as per Section 39 of the Arms Act	05/01/1995
7.	110	Report of the Forensic Science Laboratory	19/04/1993
8.	111	Report of the Forensic Science Laboratory	06/03/1993
9.	113	Note of Dariapur Police Station regarding return of Maruti Fronty bearing G.C.B. 122 to accused No.2-Salim Samsuddin Sheikh.	31/05/1993
10	114	Report of the Forensic Science Laboratory	08/02/1993
11	115	Report of the Forensic Science Laboratory	06/02/1993
12	122	A letter written by Assistant Police Commissioner to Ahmedabad Municipal Corporation.	

9. As mentioned earlier in the statement recorded by the learned trial Judge under the provisions of Section 313 of the Code of Criminal Procedure, the original accused No.1 denied all the allegations and incriminating part of evidence placed to him by learned trial Judge. However, after denying the allegations, the accused No.2 has stated in his qualifying statement that basically he is an estate-cum-auto broker. He had purchased car bearing Registration No.GCB-122 from one Gangadhar and the same was to be sold to original accused No.1 and had ultimately sold that car to accused No.1-Noor Mohmmed. So, during the interregnum period the car was with him and he has handed over the custody of the car to original accused No.1 on 04/02/1993. The car was sold at about 11:30 a.m. in the morning and accused No.1 was put to possession. He has admitted that he had applied to the Court to get the custody of the said car and in compliance of the orders passed by the Court, the car has been handed over to him and he

is the owner of the car. The original accused No.3, who has been acquitted, taken a plea of false implication and denial. In the same way, accused No.4 in his statement under Section 313 of the Code of Criminal Procedure has stated that he is the owner of Bungalow No.19, Satyam Society but no weapons have been seized from that bungalow. At relevant point of time, he was in the District Central Jail, Bhuj-Kutchch, as he was detained under the PASA since 15/12/1992 and was released on 07/01/1994. He has also produced the copy of detention order. According to him, the weapons have been seized from a soap factory. In support of his say, accused No.4 has produced the copy of light bill of that part of the bungalow. As he was not in conscious possession of the bungalow, even then he has been falsely implicated is the say in nutshell of accused No.4.

10. In the present case, the prosecution mainly relies on the documentary evidence as well

as oral evidence of six Police Officers. The other witnesses who have been examined to prove the ownership of the bungalow or the car, etc., have not supported the case of prosecution. In the same way, the Panchas in whose presence the muddamal articles were seized have also not supported the case of prosecution, but the Police Witnesses who had drawn the Panchnama or who had collected the documentary evidence, have proved the contents of the crucial documents viz., the Panchnama drawn in the compound of Dariapur Police Station regarding seizure of six live cartridges and seizure of other arms and ammunitions from Bungalow No.19 of Satyam Society.

11. The prosecution has placed certain circumstance to link the accused with the crime to establish the element of conspiracy or some understanding amongst the some of the accused persons for commission of the alleged crime. The learned Judge has enumerated the facts relied on

by prosecution in paragraph 17 of the impugned judgment as under:

i) That accused No.1 was arrested on 4/2/1993 in a drunken condition driving the Maruti Car and from that very car, six live cartridges were recovered at the instances of the accused No.1.

ii) On the clue given by the accused No.1, a raid was carried out at Bungalow No.19 of Satyam Society and from that very Bungalow one A.K. 47 Rifle, three country-made pistols alongwith used and live cartridges were seized alongwith more than 120 Killograms of silver wire.

iii) The Maruti Car involved in the crime which was driven by accused No.1 is of the ownership of accused No.2 and bearing registration No.GCB-122.

iv) The Bungalow raided from which the prohibited arms were recovered is owned by original accused No.4-Mohmmed Rafik and he was in possession of that bungalow.

12. The finding recorded by the learned trial Judge that above four major facts have been established by the prosecution successfully by leading oral as well as documentary evidence and circumstances emerging from the evidence are sufficient to link the accused with the crime and this very finding is under challenge.

13. Mr.S.V.Raju, learned Counsel appearing for the original accused Nos.1 and 2 has submitted that the finding recorded by the learned trial Judge is based on incorrect appreciation of evidence as well as by drawing certain illegal assumptions. He has further submitted that recovery of six live cartridges from Maruti Car may be a result of planting done by the Police as on 5/2/1993 when the car was searched, the said car was in custody of Police and not in custody of accused No.1. This crucial fact has been missed from the mind of the learned trial Judge and therefore the accused No.1 ought not to have been linked with the recovery of the

muddamal six live cartridges of .455 bore from the said car. At the most the accused No.1 was responsible for driving the said car in a rash and negligent manner on 4/2/1993 and one can reasonably infer that the car must have been searched or at least should have been searched on 4th instance. When it is the say of Police Witnesses examined by prosecution that the car as well as accused No.1 after its interception by Constable of Boarder Wing were handed over to local Police of Dariapur Police Station of Ahmedabad then the fact of seizure of any article on the very next date from that car would not make the person responsible, who was driving that particular vehicle on previous day. In the same way, the accused No.1 had no direct or indirect relation with Bungalow No.19 of Satyam Society which was searched by the Police. Only with a view to link the accused No.1 with the grave crime, his presence was shown with Police alongwith the member of raiding party and Panch Witnesses by prosecution. He has further

submitted that when the Panchas have not supported the case of prosecution then the accused No.1 ought not to have been linked with the prohibited arms allegedly recovered from the Bungalow No.19, is also one of the argument made by Mr.Raju. He has also submitted that when the Police has tried to implicate the accused No.4 in the crime though he was under the orders of detention and that too in a jail located at 100 Kilometer then the entire case of prosecution ought to have been viewed with doubt and the accused Nos.1 and 2 are entitled to take advantage of that shadow of doubt. The muddamal cartridges allegedly recovered from the car on the clue given by the accused No.1, that is A1 to A6 would itself not fall in the category of prohibited arms or ammunitions. They were revolvers cartridges and the learned trial Judge has erred in linking the accused with the crime which is punishable for possession of prohibited arms or ammunitions.

13.1 Mr.Raju has taken me through the depositions of witnesses examined and he has made detailed submissions. The nutshell submission of Mr.Raju is that except the evidence that accused No.2 was driving the Maruti Car in a rash and negligent manner on 4/2/1993, he should not be held responsible for recovery of six cartridges from that car allegedly traced out by the Police on the next date. In a minor offence registered by the Dariapur Police Station, the accused could have been taken to the nearest Magistrate and there was no reason for the Police to keep the accused No.1 or car in custody. Nothing incriminating was found on 4/2/1993 when the car was intercepted and handed over to Mr.Zala, Police Inspector. If the Panchnama (Exh.77) is appreciated, it appears that there is no element of discovery of fact at all in the eye of law and the accused No.1 ought not to have been attributed to the knowledge or about the conscious possession of six cartridges. In no circumstance, the conscious possession can be

presumed because it requires to be proved by the cogent evidence. Even, the Panchnama is read vis-à-vis the evidence of Police Officer, who had proved that Panchnama (Exh.77) it is alleged that the accused No.1 had shown the place from where the Officer had recovered six cartridges. There is no reference in the Panchnama that he cavity from where the cartridges were found and recovered was specially created. On the contrary, it emerges that the cavity was for the speaker which normally being fixed in a car. It is very likely that accused No.1 being driver of that car may not be aware about the cavity or presence of cartridges in that cavity. There was no history with the Police qua the accused No.1 and therefore there was no need to interrogate the accused No.1 by keeping him in custody since 4/2/1993 to 5/2/1993. So, this is a designed act of Police to implicate the accused No.1 in a serious offence.

13.2 The second point advanced by Mr.Raju is

that accused No.1 either may be the driver of the Maruti Car or may be the intending purchaser. When it has come on record that the car was given to accused No.1 on or about 4/2/1993 then only he ought not to have been held responsible for internal design of the car. It appears that Dariapur Police had not sent the accused No.1 to the nearest hospital for giving blood sample etc., if he really made offence punishable under the Prohibition Act. It is clear that the Police was contemplating the serious case against some of the accused, including the original accused No.3 and accused No.1 was used to link the original accused No.3 in the crime. This very accused No.3 ultimately has been acquitted. It emerges from the evidence that the case of prosecution once was that Bungalow No.19 was in conscious possession of original accused No.3 and when he has been acquitted, the original accused No.1 ought not to have been linked with the crime of conscious possession of six live cartridges allegedly recovered from the car.

13.3 The third point canvassed by Mr.Raju is that conduct of accused No.2 is a conduct of innocent person. He was a small-scale broker and has no criminal history. He cannot say that who removed the original number plate and when. It has come on record that accused No.2 is an estate cum car broker. He had purchased this car from one Gangadhar and payment was to be made to Gangadhar. The car was transferred in the name of accused No.2. Merely because the accused No.2 had made a claim of that car pending trial, would not make him responsible for recovery of six live cartridges from that car. The case of prosecution if is found doubtful about the recovery of six cartridges from the car for want of independent evidence then the accused ought not to have been linked with the recovery of the other prohibited arms and stock of ammunitions from Bungalow No.19. This accused No.2 was not present when the Bungalow was raided. There is clear distinction between the possession and

knowledge. Mr.Raju has placed reliance on one decision reported in **25 (1) G.L.R. 118 in case of Narsinhbhai Dahyabhai Vaghela Vs. State of Gujarat**. The relevant paragraph No.6 is reproduced herein below.

> *"The third circumstance on which the prosecution relies is that the accused produced a key of the lock of the house of the deceased from the toilet of ward no.20 of S.S.G. Hospital, Baroda. To establish this aspect of the case, the prosecution examined panch witness Pravindbhai Bhikhbhai, P.W. 20 Ex.37. Pravindbhai in his evidence stated that at 5:45 p.m. on 4-3-1979 when panchnama was to be prepared accused was present and he stated that "he willingly shows a key". This would only mean knowledge of the key and not the possession of the key. Possession and knowledge are two different aspects in law. For establishing possession the statement under sec. 27 of the Indian Evidence Act would have been "I have concealed a key or I have placed a key which I am willing to produce". Unless it is an admitted fact that it is he who has placed it possession cannot be imputed to him. Production can impute knowledge. If a person has a*

knowledge that a particular thing is lying at a particular place, that will only establish that he knew that at a particular place a particular thing is lying. This would impute knowledge and not possession. Thereafter according to this panch witness, accused took the police party to Ward No.20 and produced two keys, out of which one key of Godrej was taken possession of. Harshadrai Shukla, P.W. 27 in his evidence stated that it was that key with which the lock article 11 could be opened. This fact is not deposed by the panch witness. Not deposed in the sence that he was not asked about it. It is one thing not to take a panch witness at all. It is another thing that a panch may not ultimately support. It is third thing to take a panch and not to ask a particular question to that panch. Under these circumstances, it is highly doubtful whether the key that was produced by the accused was in his possession and it is more doubtful as to whether it was with that key that the lock was opened. That aspect is not satisfactorily established."

If the Court is of the view that the cartridges allegedly found from the car on 5/2/1993 are just similar to the cartridges recovered from the

Bungalow No.19, it would not make either accused No.1 or 2 responsible for the conscious possession of the alleged muddamal recovered from the Bungalow No.19. Even knowledge cannot be attributed to any of this accused.

13.4 The another point advanced by Mr.Raju is that the learned trial Judge has not evaluated the evidence keeping in mind the scope of planting six cartridges in the car. Certain pointed questions could have been asked by the Court itself that why the car was not thoroughly checked by the Police when it was handed over to Dariapur Police Station on 4/2/1993. Merely because the accused No.1 has been identified, as a person intercepted and handed over to Dariapur Police Station by the Constable, Boarder Wing, would not carry the case of prosecution any further. Because there was no scope for prosecution to establish the identity of accused and his presence at Dariapur Police Station on 5/2/1993 by sending the accused No.1 in hospital

for drawing the blood sample etc. The prosecution has not led any such evidence because to get the crime proved punishable under Section 185 of the Motor Vehicle Act, the blood sample ought to have been drawn from the body of the accused No.1.

13.5 Prosecution Witness No.4-Manuji Kanuji Rajput has only proved that when he was on duty at any time between 7:00 p.m. and 8:00 p.m. on 4/2/1993, he had intercepted one Maruti Car without number-plate near Bukhari Naka and upon asking he came to know the name of the driver of the car, was Noor Mohmmed. He handed over the custody of accused No.1 and Maruti Car to Police Inspector, Mr.Zala and this fact gets corroboration with evidence of Prosecution Witness No.11-Lalubha Gopalsinh Zala, who has been examined at Exh.119. It is in evidence that both these Police Officers, that is, Mr.Zala as well as Mr.Novel Vovel Parmar were serving at the same Police Station and the investigation of the

crime registered by Dariapur Police Station against the accused No.1 under Section 279 of the Indian Penal Code and under Section 184 of the Motor Vehicle Act was handed over to investigation squad. So at the most the investigation squad could have searched that car initially. The alleged co-incident of receipt of secret information against the accused No.1 and No.3 does not inspire any confidence and the learned trial Judge ought not to have accepted the evidence of three Police Witnesses to link the accused with the crime, registered on the strength of information received by Mr.Zala and Mr.Parmar. There is no link between the accused No.1 and 2. The accused No.2 is an estate-cum-car broker. He may not be even aware that the person who has handed over a car to him with a view to sell, might have driven that car in a drunken condition or might have used the same for any illegal purpose.

14. For short according to Mr.Raju there is

no convincing or cogent evidence except the evidence of Police Witnesses and the learned trial Judge has grossly erred in accepting the words of the Police Officers for recovery of six live cartridges described as Exh.A1 to Exh.A6 in the ballistic expert. The learned trial Judge has no reason to link both these accused with the recovery of the prohibited arms as well as ammunitions alongwith silver wire from Bungalow No.19 of Satyam Society because none of these two accused could have knowledge or information about the presence of these article in the cellar of that bungalow. The clue gathered by Police from accused No.1 was that accused No.1 had some link with accused No.3 and accused No.3 had some link with bungalow No.19. This accused No.3 has been acquitted by the learned trial Judge and acquittal has not been challenged by the State by filing appeal against his acquittal. In that situation this Court should acquit the original accused Nos.1 and 2 giving them benefit of doubt because the case of prosecution rests on number

of infirmities. As per settled legal position, the prosecution must establish and prove beyond all reasonable doubt that the conviction based on perception of a Presiding Officer of a Court cannot sustain.

15. Here it is necessary to mention one fact that when a pointed question was asked by the Court to Mr.Raju that there is some hairline conflict in the defence, how both these appellants can express their grievance against the judgment and order under challenge through the same Lawyer. In response of that query, Mr.Raju has responded that in the trial Court both the appellants had defended themselves by engaging different lawyer and when both the accused persons are assailing the legality and validity of the judgment and order under challenge then, he can legitimately point out the case of both the appellants and the viewpoint placed by respective Counsel with the trial Court and this Court at least should not infer against

any of these accused merely because they are being represented before this Court by a single Lawyer.

16. According to Mr.J.M.Panchal, learned Counsel appearing for original accused No.4, this is a clear case of acquittal. There are ample facts situation on the record itself which indicates that the accused No.4 has been falsely implicated in the crime. The intention of the Police was to implicate the accused No.3, having checkered history and it appears that the accused No.3 was targeted, but as number of witnesses examined by prosecution to establish the link between the accused No.3 and the Bungalow No.19 from where the prohibited arms viz., A.K.-47 Rifle was recovered alongwith country made pistol and ammunitions, the accused No.4 has been made a scapegoat. The accused No.4 was under the order of detention. The learned trial Judge has assigned illogical and unconvincing reasons to link the accused with the crime saying that there

is no evidence on record that when the accused No.4 was released from jail by the jail authorities, the order of detention inflicts the physical disability and this disability of movement is sufficient to infer that accused No.4 may not be knowing that how and in what manner the bungalow has been used and by whom. It is in evidence that wife of the accused No.4 was in-charge of the Bungalow. She has not been made accused nor has been examined as prosecution witnesses. It appears that the bungalow was divided in various parts and one part was used as printing press and portion from where the prohibited arms and ammunitions were recovered were in possession and used by accused No.3 and when that was the case of prosecution then there was no reason for the Court to link the accused No.4 with the crime. How either knowledge or consciousness can be attributed to accused No.4 qua the alleged ammunitions recovered from the bungalow No.19 was a great question before the learned trial Judge and the same has not been

properly or legally answered by the learned trial Judge. One part of the bungalow was used as soap factory. It is the say of accused No.4 that arms were recovered from the portion which was used as soap factory and not from the cellar. It is in evidence that the printing press was in use. The workers were also working there and somebody was residing on the upper floor of the bungalow in that eventuality any recovery of any prohibited substance which may be the arms or ammunitions or prohibited drug or anything, a person cannot be attributed knowledge or consciousness of availability of such material substance in absence of legal evidence. Merely because accused No.4 was the owner of the bungalow, such knowledge can be attributed otherwise no owner of an immovable property would be safe. The learned trial Judge was supposed to appreciate the defence plea of accused No.4. The say of the accused No.4 are not the bare words. He has produced documents to show that he was under the orders of detention and in Central Prison at

Kutchch-Bhuj on the date on which the bungalow No.19 was raided by the Police. The Police has not even explained as to why the bungalow was open with broken lock. The Police could have produced the map of the lock of the bungalow because it is in evidence that such an attempt was made to get the map prepared of the bungalow, but no evidence is shown that such map was prepared or not. The learned trial Judge ought not to have presumed anything against the accused merely because he was the owner of bungalow No.19 at relevant point of time. The production of electricity bill with the explanation given by the accused No.4 and certain answers given by even Police Witnesses examined during the course of trial as to the usage of bungalow and method of entry in the bungalow by the raiding party are sufficient to show that accused No.4 was innocent or he may not have any knowledge or information of the material allegedly recovered from that bungalow.

17. It is not the case of prosecution that accused No.4 was present at the time when his bungalow was searched and prohibited arms alongwith ammunitions, etc., were seized, nor it is the case that accused No.1 had given any clue to Police as to the involvement of accused No.4 in the crime. Mere ownership of house even if it is proved, no knowledge or conscious possession can be attributed to the owner of the house and the prosecution is under obligation to lead the evidence to that effect, is one another argument advanced by Mr.Panchal. A plain reading of the F.I.R. (Exh.94 and Page No.411 of paper-book) and sanction accorded by the competent authority (Exh.103 – Page No.425 of paper-book) to prosecute the accused No.4 under the offences punishable under the Arms Act, does not speak anything about such knowledge or conscious possession of prohibited articles recovered and this would go against the prosecution. The learned trial Judge has not considered this aspect in legal perspective. It is also argued

that ownership is a different concept and the evidence led by prosecution as to the ownership of Bungalow No.19 of Satyam Society is also not clear. The prosecution was supposed to prove that accused No.4 was not only the owner of Bungalow No.19 but was also occupier of the part of the bungalow from where the prohibited arms and ammunitions were searched and seized. To prove this aspect, the prosecution could have examined the Chairman of the Satyam Co-operative Housing Society. As per record one Babulal Manilal was the owner of the bungalow and if it is the case of prosecution that accused No.4 was the owner of the bungalow then this Babulal Manilal could have been examined by the prosecution and this infirmity is an important infirmity to link with the accused with the crime and in attributing either knowledge or conscious possession of the prohibited articles.

18. Mr.Panchal, has further submitted that element of fair investigation which is a prime

requirement to link the accused with the crime to secure conviction is missing. There is no investigation on the point that who is the owner of the silver wire found more than 120 Kilogram. True it is that in the detention order issued by the competent authority under the PASA, the place of resident of the accused is shown to be 19th Satyam Society, which is the raiding place, but that by itself would not add any weight to the case of prosecution. The crucial question is that why the prosecution has suppressed this aspect that the accused No.4 was under the orders of detention and many persons had opportunity to enter into the area occupied by the accused No.4 and the management of the printing press was initially handed over to the wife of accused No.4, while accused No.4 was under detention. There is clear reference in the deposition of Prosecution Witness No.10 (relevant page No.161 of paper-book) that persons were working in printing press even then there is no reference that who were those persons and the prohibited

arms and ammunitions seized was lying in which part of the printing press. It appears that there was a hole which was opened by the search team and prohibited material was taken out either to acquit the accused No.3 or with a view to implicate the accused No.4. This lacuna has been left by the Investigating Agency and the map of the bungalow was not produced during trial. The discovery Panchnama (Exh.77) indicates one fact that Bungalow No.19 divided in various parts and it is clear that Bungalow No.19 of Satyam Society was divided in part viz., 19/1, 19/2 and 19/3, etc. In that fact situation, the prosecution could have led cogent evidence that the portion of the Bungalow No.19 from where the prohibited arms and ammunitions were seized and recovered was in occupation / possession of accused No.4 and Investigating Agency has neither collect nor led such evidence.

19. One another argument advanced by Mr.Panchal is that the Court should look to

certain admissions made by the accused No.4 while offering explanation to the Court under Section 313 of the Code of Criminal Procedure in reference to the incriminating evidence led against him and it appears that the prosecution case itself gives different version. On one hand it is the case of prosecution that the area from where the prohibited arms and ammunitions were found, used by and in possession of acquitted accused No.3 and under that information particular part of Bungalow No.19 of Satyam Society was raided. The prosecution has also attempted to show that acquitted accused No.3 was indulging in storing, selling and trafficking of prohibited arms and ammunitions and on the other hand it was argued before the trial Court that accused No.4 being owner and occupier of the Bungalow can be held guilty saying that he was in conscious possession of this prohibited articles. But, when the prosecution has not led any evidence as to the link between the accused No.3 and 4 nor any investigation in that direction was

carried out, the accused No.4 ought not to have been linked with the crime. Mr.Panchal has read over the charge framed by the trial Court. The first set of case placed by prosecution says that all the accused persons were in conscious possession or knowledge about prohibited articles. The second set of impeachment says that acquitted accused No.3 was in possession of the printing-press including the hostile witnesses (Exh.103). The third set of facts emerging from the evidence led by prosecution is that some persons were residing in the upper part of the bungalow. The raiding party had not entered into that area and for that this Court can read evidence while considering the evidence of Prosecution Witness No.9 who has been examined at Exh.107, because certain contradictions made by this witnesses were pointed out to this witness and they have been proved during the deposition of Investigating Officer. This aspect clearly indicates that prosecution was not even sure on the ate of prosecution that accused Nos.3 and 4

simultaneously were in possession of the part of the bungalow from where the prohibited substance were actually recovered. The conduct of the Officer who raided the premises or say part of Bungalow No.19 is also found strange and highly improbable. There was no need to take out a grill of window. In absence of Panchas the lock could have been broken open. How the grill which was taken out dealt with on completion of the second part of the Panchnama is also not satisfactorily placed by prosecution on record. It is very likely that in absence of accused No.4, somebody may have misused or even wife of the accused No.4 as her husband was under the order of detention in connivance of any person and that person may be the acquitted accused No.3 may have indulged in such activity. In absence of specific charge to that effect and when accused No.3 has been acquitted and wife of the accused No.4 is neither prosecuted nor cited as a witness, accused No.4 could not have been linked with the crime. The Investigating Officer,

Mr.B.R.Patil, (Exh.121) has stated that the accused No.4 came to be arrested on 7/10/1994 but this arrest was made as symbolic custody of the accused No.4 who was taken over from a TADA case, to one another case that was pending against the accused No.4. It was easy for the accused No.3 to implicate the accused No.4 in this serious offence as he was physically legally disabled person in the jail custody. The accused No.4 may be knowing or may not be knowing as to the illegal use of his bungalow or part thereof, as he was not physically present since months prior to the date of raid because he was detained under the order of detention. The duty of the prosecution is to establish that accused No.4 was found in conscious possession and to prove that conscious possession, the cogent and convincing evidence was required to be led and this part of evidence is missing.

20. Mr.Panchal has placed reliance on the decision reported in **AIR 1972 S.C. 1756 in case**

of Gunwantlal v. State of M.P. It would be beneficiary to quote the relevant part of the cited judgment.

> *"5. .....The possession of a firearm under the Arms Act in our view must have, firstly the element of consciousness or knowledge of that possession in the person charged with such offence and secondly where he has not the actual physical possession, he has none-the-less a power or control over that weapon so that his possession thereon continues despite physical possession being in someone else. If this were not so, then an owner of a house who leaves an unlicensed gun in that house but is not present when it was recovered by the police can plead that he was not in possession of it even though he had himself consciously kept it there when he went out. Similarly, if he goes out of the house during the day and in the meantime someone conceals a pistol in his house and during his absence, the police arrives and discovers the pistol, he cannot be charged with the offence unless it can be shown that he had knowledge of the weapon being placed in his house. And yet again if a gun or firearm is given to*

his servant in the house to clean it, though the physical possession is with him nonetheless possession of it will be that of the owner.....”

20.1 Mr.Panchal has also placed reliance on one judgment reported in **AIR 1977 S.C. 1066 in case of Narpal Singh v. State of Haryana** where the Hon’ble Supreme Court has differentiated possession and custody.

21. It is also submitted by Mr.Panchal that the prosecution could have collected the evidence either direct or satisfactorily that whether these prohibited articles were placed or stored in the bungalow prior to the date of order of conviction or after the date of orders of conviction. It appears that the prosecution must have collected such evidence. The Investigating Agency also must have tried to know the source form where these articles were procured and brought to Bungalow No.19 but the prosecution has tried to put curtain on all these aspects. This

conduct of the prosecuting agency is resulted into serious prejudice. One of the backbone submission of Mr.Panchal is that the reasons assigned by the learned trial Judge in paragraph – 42 of the judgment (Page No.283 of the paper-book) are neither legal nor logical and no conviction on such an infirm logic can sustain.

22. Ms.Pandit, learned A.P.P., has strongly resisted the submissions made by Mr.Raju, as well as Mr.J.M.Panchal. She has pointed out certain undisputed or well proved facts that have been considered by the learned trial Judge while recording the ultimate finding. According to her, there is sufficient evidence on record to show that accused No.1 was found driving the motorcar in rash and negligent manner and in a drunken condition and therefore he was prosecuted for the offence punishable under Section 279 of the Indian Penal Code and under Section 185 of the Motor Vehicles Act. A person who had intercepted the car and stopped the accused No.1

had no reason to stop the car unless he was compelled to do so, because the car was driven in rash and negligent manner and the same was without any number-plate. After intercepting accused No.1, Prosecution Witness No.4, Manuji Kanuji Rajput realized that the driver of the said car was in a drunken condition and in turn the custody of the driver was handed over to Police Inspector, Dariapur Police Station. Mr.Zala, Police Inspector, completely corroborates the say of P.W.No.4. If it was designed from the beginning the date of search of the car could have been shown to be 4th February instead of 5th February. This Court should look to the timings and so also one another fact that as per the case of prosecution the secret information was received by Mr.Parmar, Police Inspector so at the time of detaining the car or accused No.1, neither P.W.No.4 nor P.I. Mr.Zala were knowing that car which was intercepted and seized was carrying six live cartridges of .455 bore. So the learned trial Judge has rightly

appreciated the evidence of these three Police Witnesses. To prove initial part of the story of prosecution there was no need of having any independent witnesses. It is true that Panchas have not supported the case of prosecution but there was reason for Dariapur Police to interrogate the accused No.1 and ultimately at the instance of accused No.1 only six cartridges were recovered from the cavity of the car. If the Court finds that the time taken by Police in searching the car thoroughly would not make the prosecution case doubtful. The substantive part of the Panchnama has been proved by the Officer who had searched the car and found six cartridges at the instance of accused No.1. There was no legal bar in accepting the evidence of the Investigating Officer. There was no reason for the Police to plant six cartridges because the cavity cannot be created in couple of minutes or hours that too when the car was kept in open piece of land abutting the Dariapur Police Station. It is true that cavity from where the

cartridges were found were meant for placing the speaker. Practically all cars having either Tape Recorder or C.D. Player have such cavity but it was exclusive knowledge of accused No.1 that in a particular cavity where these cartridges were lying and found from it. So, there was sufficient evidence to link the accused No.1 with the crime.

23. The another point advanced by Ms.Pandit is that the learned trial Judge has assigned sound reasons to link the accused No.2 with the crime. The prosecution cannot take advantage of weakness in the defence plea taken, but certain admissions made by the accused if are found helpful to the Court at the time of appreciating the case of prosecution or the strength of the evidence led by prosecution, the trial Court can consider all such admissions and draw inference legally. The accused No.2 has stated that he is an estate cum car broker who had purchased the car from one Gangadhar but undisputedly the accused No.2 was the registered owner. No

written document as to the sell of the car by accused No.2 to accused No.1 is found on record. The accused could have produced such document. Evidence as to the payment made by the accused No.1 to accused No.2 also could have been brought on record. The argument made by Mr.Raju should not be accepted that accused No.2 was totally innocent and he may not be aware that accused No.1 or anybody else who is put to possession and enjoyment of the car may also misuse the car. When the say of accused No.2 is that till previous day the car was with him then he was the only person who could have explained that when the original number plate was removed from the car. The prosecution also could have collected that evidence but fact remains that when this car was intercepted and stopped incidentally for one another criminal wrong, was not bearing its original number plate. The accused No.2 had applied for the custody of the car and obtained the orders from the competent court for custody of the said car pending the trial in the capacity

of the owner of the car. If he has transferred his interest then accused No.1 could have claimed the right over that car. In the present case, the accused No.2 had claimed the custody of the car so it is inferable that accused No.2 had not transferred his interest and ownership for the car to accused No.1 or anybody else. It was not possible for the trial Judge to say that in light of the evidence led by prosecution that accused No.2 has been implicated merely because he was the registered owner of the car. On the contrary the conduct of the accused No.2 prior to and subsequent to the incident helps the case of prosecution. The explanation given by accused No.2 is nothing but the convincing explanation. Though the accused No.3 was named as occupier of bungalow No.19 but ultimately it was found during trial and on the strength of the evidence collected and led by prosecution that accused No.4 was the person who was occupying the bungalow No.19. She has further submitted that merely because the prosecution has failed in

getting the fact established that accused No.3 was also one of the occupants or was individually occupying the part of bungalow No.19, would not make the case of prosecution baseless so far as the case of prosecution against the accused No.3 is concerned.

24. It is further submitted by Ms.Pandit that certain irregularities are found and with a little effort the Investigating Agency could have taken certain steps to add more strength in the case of prosecution. Though the order of preparation of map of the bungalow No.19 was given, there was no reason for the Officer who had charge-sheeted the accused persons to suppress the map. If the Revenue Authority had failed in preparing the map of the bungalow showing different parts or partition therein, it was possible for the Investigating Officer to state transparently that ultimately they could not procure the map from the revenue authorities. This Court if finds that certain irregularities

have been committed or infirmities have cropped up on account of some negligence on part of the Investigating Officer then this Court can make necessary observations and even direct the State Machinery to initiate steps or the Department itself suo motu also can order to initiate action. The irregularities pointed out or infirmities that have been emerged are not sufficient to dilute the case of prosecution. The accused No.1 was physically present when the Bungalow No.19 was searched. It is true that accused No.1 had stated that he had never divulged any fact or has given any clue to Police during his interrogation and the Police Inspector, Mr.Parmar says that he was able to divulge the clue from accused No.1 only. The learned trial Judge has no reason to disbelieve the say of Police Inspector, Mr.Parmar merely because the record does not speak that any third degree method was adopted by Mr.Parmar or not and when it was open for the trial court to place reliance on the evidence of the Police Witnesses

if such evidence is found trustworthy then the accused can be convicted on the strength of the evidence of Police Witnesses. Ms.Pandit, has pointed that the order of detention was issued by the detaining authority and accused No.4 was detained under the PASA, but the physical presence of the accused No.4 is not required when the premises was searched. The owner of the house unless permits or accord consent the premises like bungalow possibly locked normally could not be misused. So, the trial Judge was right in inferring of consent given in connivance of accused No.4. It is in evidence that there was curfew in the area when the Bungalow No.19 was searched and ultimately the Investigating Officer has stated that in a given circumstance they had taken out the grill and had entered into the area. When it emerges that bungalow was divided in more than one part and one such part was used as even soap factory, the best possible and easy method can be adopted by Police and there was nothing wrong and overtact by

Police which should be viewed with suspicion. According to her, this is a full proof case. In support of her submission, she has placed reliance on the decision reported in **AIR 1985 SUPREME COURT 1672 in case of Kailash Chandra Sahu v. Republic of India.** It would be beneficial to quote the relevant paragraph of this cited decision.

> *"2. This case involves a very short point, viz., where opium is found in the licensed ganja shop of the licensee and the salesman alone was present in the shop, would the licensee be liable for having committed the offence of possession of opium? The facts of the case have been fully narrated in the judgments of the courts below and it is not necessary for us to repeat the same all over again. The facts clearly show that the opium was kept in the licensed shop of the appellant and the mere fact that he was absent at the time of the raid would not absolve him from criminal liability."*

24.1 She has further placed reliance on the decision **AIR 1973 SUPREME COURT 2309 in case of Inder Sain v. State of Punjab.** It would be

beneficial to quote the following paragraphs of this cited decision.

> *“20. In the last analysis, therefore, it is only necessary for the prosecution to establish that the accused has some direct relationship with the article or has otherwise dealt with it. If the prosecution proves detention of the article or physical custody of it, then the burden of proving that the accused was not knowingly in possession of the article is upon him. The practical difficulty of the prosecution to prove something within the exclusive knowledge of the accused must have made the legislature think that if the onus is placed on the prosecution, the object of the Act would be frustrated.*
>
> *21. It does not follow from this that the word 'possess' in S. 9 does not connote conscious possession. Knowledge is an essential ingredient of the offence as the word 'possess' connotes, in the context of S. 9, possession with knowledge. The legislature could not have intended to make mere physical custody without knowledge an offence. A conviction under S. 9 (a) would involve some stigma and it is only proper then to presume that the legislature*

intended that possession must be conscious possession.

22. But it is a different thing to say that the prosecution should prove that the accused was knowingly in possession. It seems to us that by virtue of S. 10, the onus of proof is placed on the accused when the prosecution has shown by evidence that the accused has dealt with the article or has physical custody of the same, or is directly concerned with it, to prove by preponderance of probability that he did not knowingly possess the article.

23. In his statement under Section 342, the appellant totally denied having anything to do with the parcel. He had no case that to his knowledge the parcel contained anything other than apples. He never put forward the case that he bona fide believed that the parcel contained only apples. He was in physical custody of opium. He had no plea that he did not know about it.

24. We are, therefore, inclined to confirm the conviction and we do so."

24.2 This Court should look to the charge framed against the accused persons and there is clear reference of Section 35 of the Arms Act.

So the judgment of the Supreme Court would be applicable. One of the cited decisions deals with the case registered under the Opium Act. However the ratio of the judgment would square help the prosecution because very similar provision to raise presumption like Arms Act was there in the Opium Act at relevant point of time and the prosecution was under obligation to establish the fact of possession of prohibited arms or ammunitions punishable under Section 25 (1) (a) and possession does not mean only physical or actual possession but includes the constructive possession. The prosecution can led evidence to raise presumption that the possession of the prohibited arms and ammunitions seized in the present case were under the control or domain of the accused No.4 and the learned trial Judge has assigned good reasons. This Court also can evaluate the evidence in this regard afresh and can record a finding either confirming the judgment of the trial Judge for the same reasons and by assigning additional good reasons. In the

same way this Court can by assigning detailed reasons reverse the finding recorded by the learned trial Judge. But according to her, this is a case where appeal of all the three appellants should be dismissed.

25. Firstly it is necessary to state in brief the facts stated by the witnesses examined by prosecution and the purpose for which the particular witness was called upon to depose before the Court. Defence side has not examined any witnesses. Though accused Nos.2 and 4 have placed their say while putting a specific defence theory, both these accused persons have also produced some documents in support of their defence plea taken by them.

26. Prosecution Witness No.1-Pankajkumar G. Chauhan, has been examined at Exh.75 to prove the contents of the Panchnamas drawn at Exh.76 and Exh.77, but this witness has not stated anything in detail in respect of the contents of the

Panchnama drawn and for this reason he was declared hostile by the prosecution. However, this witness has identified the signature on both these Panchnama. He has deposed that when he was called at Police Station, one Maruti Fronty Car of Green Colour was lying there. The car has been seized and Panchanama in this regard has been drawn. During the cross-examination, he has also identified his signature on the slip taken out from one packet containing six cartridges and that slip was produced at Exh.79. This witness has denied that he had gone to Satyam Society, Nr.Bahai Center alongwith two Panchas and Noor Mohmmed. This witness has also denied the suggestions made to him regarding seizure of A.K. 47 Rifle and 15 cartridges thereof alongwith other cartridges of .455 bore. He has also denied the suggestion that in his presence 90 cartridges of 12 bore rifle and 16 cartridges of 38 bore rifle had been recovered. He has also denied that any used cartridges were recovered in his presence. In short this witness has denied

all the suggestions made to him. However, this witness has identified his signature on 12 different slips taken out from the sealed parcel and these slips were tendered in evidence vide Exh.80 to Exh.91. He has not identified accused No.1. No cross-examination has been conducted by the other side. This witness, for short, has not supported the case of prosecution.

27. Prosecution Witness No.2-Novel Vovel Parmar, has been examined at Exh.93 and is a Police Witness. He has deposed that on 5/2/1993 he was on duty as Police Inspector, Dariapur Police Station of Ahmedabad City. Accused-Noor Mohmmed Sheikh was arrested in connection with offence registered being C.R.No.I-50 of 1993 punishable under Section 279 of the Indian Penal Code and etc. This witness has received secret information that Noor Mohmmed was illegally transporting the prohibited arms and ammunitions and doing the business with Abdul Wahb Abdul Majid, who is acquitted accused No.3. Noor

Mohmmed had informed this witness that cartridges were kept in the seized Maruti Car and that Car was lying in the compound of the Police Station. No numberplate was affixed either on the front or backside of the Maruti Car. In presence of Panchas the car was searched and accused No.1-Noor Mohmmed took out six cartridges from the cavity of right side rear seat near the speaker of the car. The cartridges were live, written with Eley London and of .455 Revolver. Panchnama of seizure of six cartridges were drawn and signatures of the Panchas were obtained. This witness has identified the six cartridges shown to him and recovered from the Maruti Car. A formal complaint with Dariapur Police Station was lodged. This witness has identified his signature and proved the complaint produced at Exh.94. After registering the offence, further investigation was handed over to Mr.Panchal, P.S.I. and this witness was continued with him during the investigation. Noor Mohmmed was thereafter interrogated, who had disclosed that

other arms were concealed in the house owned by Mohmmed Rafik at 19, Satyam Society, Shahpur. Noor Mohmmed had shown the house and in that house Noor Mohmmed, two Panchas and Police Personnels were entered. They also went to the backside Varanda of the house and Noor Mohmmed showed a door of iron grill and stated that weapons were lying in the cellar. After opening the iron door, all had entered into the cellar where three plastic bags and three jute bags were found. Upon searching the muddamal, from the plastic bag, one A.K.47 Rifle in a running condition, 24 live cartridges, live magazines, three country made pistols, various type of live cartridges and 18 used cartridges of different types were found. Silver wire was also found out from the three jute bags. One goldsmith, Rameshbhai was called upon and on weighing the silver wire, it was 122.5 Kilogram. The Panchnama of all these muddamal was drawn and was sealed. Panchnama drawn at Exh.77 was shown to him and he identifies his signature so also, the

signatures of Panchas. This witness also identifies his signature, so also, signatures of Panchas on the slips taken out from the muddamal parcel and produced at Exh.79 to Exh.91. This witness has also stated that A.K. 47 Rifle was a prohibited arms, an automatic and found in running condition. Four persons as accused were present in the Court and accused-Noor Mohmmed was at Sr. No.3 and this witness has identified him. This witness has been cross-examined by the other side and has stated that no such Rule was in force that at the first instance when the case was registered, a person or vehicle is required to be seized. There was a wall surrounding the Dariapur Police Station. This witness has denied the suggestion that there is a hospital in the compound of Dariapur Police Station, so also, the open ground surrounding the Dariapur Police Station. Before the cartridges were found from the cavity of the Maruti Fronty Car, the said car was in the custody of the Police. A police guard (Santri) was standing at the distance of about 10

feet from the car, but no other special police was deputed. The car was seen on 5/2/1993 between 11:50 and 12:00 a.m. This witness has denied that to earn fame the false case was lodged. He has admitted that on 4/2/1993 at about 19:20 hours in the evening, while Noor Mohmmed in a drunken condition was going on with his car near Tambu Chowky he was caught. Thereafter, he was taken to Dariapur Police Station and then arrested. This witness does not know that whether the charge-sheet came to be filed or not in connection with the offence registered being I-C.R.No.50 of 1993. During cross-examination this witness has stated that he does not recollect that whether the business in the name and style of Offset Printing Press was running in the cellar of house or not, when they seized the bungalow. Due to curfew, the press was closed. This witness does not recollect that whether the printing machine was there or not. There is an open Varanda on the northern side of the house. This witness does not recollect that

whether there was a door outside the house or not. This witness has denied that after breaking a door, when they had entered, there was a soap factory. No documents as to the ownership of the bungalow were recovered. Number of meter was written. This witness has denied that Varanda is the road of Satyam Society. This witness has admitted that no statements of neighbouring persons were recorded. For short, this witness has proved all important details of crucial documents, that is, Exh.77 seizure of prohibited arms and ammunitions.

28. Prosecution Witness No.3, Chandansinh Naransinh Rajput, has been examined at Exh.98. He has deposed in his testimony that in the year 1993 he was discharging his duty as Police Inspector, Shaher Kotda Police Station. He was deputed at Dariapur Police Station for the special squad known as Latif Squad. On 5/2/1993 accused-Noor Mohmmed was arrested in connection with another offence. Noor Mohmmed took out six

cartridges from the right side of the rear seat near the speaker of the car and as per information given by him, Bungalow No.19 of Satyam Society was raided and he went there alongwith Mr.Parmar, P.S.I., and Panchas. They all entered into the house. They also went to the backside Varanda of the house, opened the iron window and thereafter they went inside the cellar where three plastic packet and three jute bags were recovered. From the said packets, one A.K. 47 Rifle, three country made pistols, different type of live and used cartridges were found. Silver wire was found from the jute bags which was weighing to 122 Killogram. The Panchnama was drawn and muddamal were seized. This witness has identified the muddamal articles and accused-Noor Mohmmed before the Court. During cross-examination, this witness has stated that area of Dariapur Police Station was thickly populated area and opposite to Police Station, office of the Superintendent of Police was situated. There was a compound wall surrounding and opposite to

the Dariapur Police Station. Vehicles seized were parked in the compound of Dariapur Police Station. No documents regarding ration card, election card, electricity papers or utensil were recovered form the house. The police investigation was carried out by Mr.Panchal, P.S.I. and Mr.Parmar, Police Inspector, was accompanied with him. This witness has denied that to help Mr.Parmar, P.I., he gives false deposition. During cross-examination this witness has stated that house was closed from where the muddamal was seized. No person was found inside the house. He does not say and recollect that whether the house was in used condition or not. He also does not state that whether the house was in unused condition. He has denied the suggestion that muddamal were recovered from the house adjacent to house No.19. He has denied that a soap factory was running in this house.

29. Prosecution Witness No.4-Manuji Kanuji Rajput, has been examined at Exh.99. He has

deposed in his testimony that on 4/2/1993 he was discharging his duty in the Boarder wing as Police Constable at Dariapur Tambu Chowky and Rajikhan-Constable was with him on duty. His duty hours was between 4:00 p.m. And 8:00 p.m. and while he was at Bukharinaka at about 7:00 to 8:00 p.m., one blue colour Maruti came with excessive speed. He intercepted this car which was without number-plate. Noor Mohmmed was driving the car in a drunken condition. Upon interrogated he told that his name was Noor Mohmmed and was to go to Shahpur. He did not allow him to go and Mr.Zala, Police Inspector came to Tambu Chowky and thereafter this witness had handed over the custody of car as well as custody of Noor Mohmmed to Mr.Zala. This witness has identified Noorm Mohmmed who is present in the Court. During cross-examination, he has stated that from 4/2/1993 to 6/2/1993 he was serving there continuously. He had not searched the car or person driving the car. This witness has denied that at the instance of Police, he identified

Noor Mohmmed. He has also denied that he was not present at Tambu Chowky and intercepted Noor Mohmmed.

30. Prosecution Witness No.5-Kamleshbhai Kantilal Thakar, who has been examined at Exh.100. He has deposed in his testimony that he was discharging his duty as Ward Inspector, Khanpur Area. Register was maintained for the immovable property situated in the corporation area. He brought with him a Property Tax Demand Register. Property NO.2702/E/8 was situated in Shahpur Mill Compound, Khanpur Area, which was situated in Satyam Co-operative Housing Society where name of Shah Babulal Manilal was running as tax payer; whereas name of Mohmmed Rafik Sheikh was running as occupant. The register is of the year 1992-93. He brought with him a certified copy prepared from the original register and produced at Exh.101 which was signed by him, his superintendent-Lataben and Manager-Prasant Shah. During cross-examination this witness has stated

that name of Mohmmed Rafik was shown as an occupant but no details thereof have been mentioned as to the identity of the occupant.

31. Prosecution Witness No.6-Kantibhai Shivrambhai Patel has been examined at Exh.102. This witness has stated in his chief-examination that he was running press in the Satyam Society, Shahpur and the number of bungalow was fifteen. In the cross-examination conducted by A.P.P., declaring this witness as hostile to the prosecution this witness has stated that number of bungalow was nineteen. He has denied suggestion that this bungalow was purchased by Mohmmed Rafik, brother of Wahab. When there is no cross-examination as to the number of bungalow, it is inferable that press was run in the cellar of bungalow No.19 and initially run by this witness. However, thereafter he had started his business in the name and style of Gayatri Mudralaya in Dudheshwar area. Thus, the existence of a printing press in the cellar of

Bungalow No.19 stated by the Police Witnesses gets corroboration from the deposition of this hostile witness.

32. Prosecution Witness No.7-Bhupendra Nandlal Shah has been examined at Exh.103. He has deposed in his testimony that earlier he was doing his own business of printing. He knows Kantilal Shivram Patel where he was serving. Kantilal Shivram Patel was also doing work of printing press upto 1981. The work of printing press was running at Satyam Society, Shahpur. Fatehbhai was working with him in the press. Police has interrogated him. During cross-examination this witness denies that press was run by Babubhai Manilal. He denies and has not stated in his police statement that Babubhai sold the press to Abdul Wahab Mazidkhan Pathan for consideration of Rs.6 Lacs. This witness has even refused to identify the accused Nos.3 and 4. The evidence of this witness is not even useful to prosecution except to the extent that he was

aware about the existence of the press in one of the bungalow of Satyam Society, initially owned by P.W.No.6. It is possible for prosecution to argue that these two witnesses were genuine witnesses to prove the link between the press installed in the cellar of bungalow No.19 and accused Nos.3 and 4.

33. Prosecution Witness No.8-Samsuddin Hussainmiyan Sheikh has been examined at Exh.104. Accused No.2 is his son. Though this witness has not supported the case of prosecution, he was asked to step in the witness box to prove that Maruti Car bearing Registration No.G.C.B. 122 was kept in the compound of his house and accused No.2 was staying on the first floor of his house. When the prosecution has led other evidence to establish the ownership of the said car, the case of prosecution does not affect adversely when this witness was declared hostile.

34. Prosecution Witness No.9, Fatehmohmmed

Ismailbhai has been examined at Exh.107. He has deposed in his testimony that he was doing the work of printing press with Kantibhai and said printing press was situated in one of the bungalow of Satyam Society. Name of this witness has been referred by Prosecution Witness Nos.6 and 7 as persons working in the press of Prosecution Witness No.6. Though this witness has been declared hostile by prosecution, he has clarified one crucial fact that the owner of the said bungalow was Babubhai and Kantibhai was the tenant. He also stated that adjacent to the press, one soap factory was there which was closed. On one side of the press, there was residence and upper portion was vacant. During cross-examination this witness has stated that the press in which he was working is known as Victor Printing Press.

35. Prosecution Witness No.10-Jayantilal Hiralal Panchal has been examined at Exh.108. He has deposed in his testimony that on 5/2/1993 he

was discharging his duty as Police Sub Inspector with Dariapur Police Station and was entrusted the investigation of the offence in question. He was the Officer who had raided the Bungalow No.19 of Satyam Society and found one press was in that building. One gallery was adjacent to the press and door of the size of 3' x 3' was also found. There was a big room wherein different stock of paper was lying and upon removing it, an iron cover was found and on taking out the cover one cellar was found and from the cellar one jute bag was recovered. On opening the jute bag, one A.K. 47 Rifle, three country made pistols, etc. was found.

35.1 This witness has not stated in detail anything about three plastic bags nor about the total number of jute bags which were found. But when other details of the muddamal recovered has stated by this witness, the contradictions found does not appear to be a material contradictions. During investigation this witness has collected

the documentary evidence as to the ownership of the car bearing Registration No.G.C.B. 122 from R.T.O. According to this witness the car was of the ownership of Noor Mohmmed or Salim but he does not recollect the name. No statement of the R.T.O. Officer was recorded to know about the ownership of the car. It is true that deposition of this witness is not an wholehearted piece of evidence for reason best known to him, but the documentary evidence collected as to the ownership of the car from the government record appears to be sufficient effort made by this witness to link the accused No.2 with the crime and when accused No.2 himself has admitted his ownership of car by claiming ownership, the confusion expressed by this witness in chief-examination would not affect the case of prosecution. Though this witness has replied in cross-examination made on behalf of accused Nos.3 and 4 that press was in running condition and workers were working and the press was not in the cellar. However, the fact of existence of press

in a cellar has come on record and proved by witnesses examined by the prosecution including the hostile witnesses. It is not possible for this Court to accept that actually the press was working and at the time of raid workers were inside the press. Normally in such a case, the detailed Panchnama of the area where the prohibited arms and ammunitions found and recovered should be drawn by the Police. It was an offset press. Though some papers were lying in one of the corner but no other material which can be said to be a very fresh that can be used to take out a print or to put the press in motion, is mentioned in the Panchnama. This witness has admitted that he had not gone with the raiding party to the upper part of the bungalow nor had inquired as to occupancy of the upper part of the bungalow. There is nothing on record to show that it was possible for the person present in the printing press area of the bungalow had an opportunity to enter the upper portion of the house without making any extra

effort or the person residing on the upper floor could easily go to the area of printing press of the bungalow. This witness has fairly accepted that no map of the area raided was prepared by him. He has denied that muddamal was recovered form the soap factory. One hostile witness has stated that soap factory is a different property so merely because no statement of the Chairman of the Society has been recorded during investigation, it would not make the case of prosecution improbable. On the contrary, another evidence led by prosecution and the facts that has come on record during the course of cross-examination vis-a-vis the explanation given by the accused and the electricity bill produced by accused No.4 in support of his say, satisfactorily clarifies that bungalow No.19 was divided in different portions and there were more than one compartments. If as per clue given by accused No.1 the Police was able to reach to the place where the muddamal was stored in a particular area / part of the bungalow No.19 then

it was not necessary to enter through the other located area. When it has come on record that bungalow No.19 was located and nobody was inside and because of the curfew or other disturbance the press was not working on the day of raid then the exercise undertaken by this witness in presence of Senior Officers and members of raiding party cannot be said to be incomplete or infirm.

36. Prosecution Witness No.11-Lalubha Gopalsinh Zala has been examined at Exh.109. On 4/2/1993 he was working as Police Inspector, Dariapur Police Station and has proved the fact of initial arrest of accused No.1 while he was driving the Maruti Fronty Car. The evidence of this witness corroborates with the evidence of police constable of Boarder Wing, who intercepted the car going without any numberplate. This witness has stated that the car was bearing Registration No.G.C.B. 122 but, does not get any corroboration that the car was bearing

numberplate at the time when it was intercepted. This witness had sent the muddamal for analysis to the F.S.L. For want of formal existence, F.S.L. Report has been received in evidence vide Exh.110 and Exh.111. This witness has also proved one fact that this car was handed over to accused No.2 in compliance of the orders passed by the Court against his claim for ownership of the car. This witness has admitted that Mr.Parmar, was his senior. However, he has denied that he has deposed as per story of the prosecution to save Mr.Parmar. It has come on record that Dariapur Police Station has entry gate and has denied that boys were used to play cricket in the compound and nobody can enter into the compound. This witness has proved that key of the vehicle seized is being kept with the crime writer head, but no record about getting the key of the car back for doing search action on 5/2/1993 has been collected nor the statement of the crime writer head has been recorded. This appears to be a lacuna but what would be the

effect of this lacuna is again a question. When the car intercepted was parked after late evening on 4/2/1993 and the accused No.1 was detained and arrested for the offence punishable under Section 279 of I.P.C. and 185 of the Motor Vehicle Act, whether it was possible to plant six live cartridges of .455 boar to carve out a sensational case when Police Inspector, Mr.Zala had no information or other details about the activity of involvement of the accused No.1 in a serious illegal offending activity. Because the secret information was received by Mr.Parmar is the case of prosecution and on the strength of information received by Mr.Parmar the accused No.1 was interrogated and on the clue given by him the cartridges were recovered. It was the duty of Police Inspector, Mr.Parmar to call the Panchas to ascertain the correctness of the facts stated by accused No.1 or clue given by him. So the Panchas were called and when Mr.Parmar realized that accused No.1 is knowing something and even source also can be traced out which

would open the scope of further investigation into the matter, the Court is surprised that how and why Mr.Parmar handed over investigation to Mr.Panchal, an Officer subordinate to him when he must have realized that accused No.1 can give other details after recovery of six cartridges from Maruti Fronty Car. It is the experience of the Court that Police Force have number of Officers who have psychology to escape from the responsibility to undertake the sensitive or a complex investigation. But it is relevant to note that Mr.Parmar had accompanied the team which had proceeded to bungalow No.19 alongwith those two Panchas who were initially called. Two senior Officers though were there, the investigation was carried by Mr.Panchal, P.S.I. and the evidence of this witness provides sufficient corroboration to other two Senior Police Officers who was present at the time when part of Bungalow No.19 was searched where the printing press was installed and the muddamal was seized. Though Prosecution Witness No.11 has not

stated that he himself was present when the arms and ammunitions were seized from Bungalow No.19, one fact is found established that he is the person who took custody of accused No.1 and Maruti Fronty Car from constable of Boarder Wing and registered offence punishable under Section 279 of I.P.C. and under Section 185 of the Motor Vehicle Act. Names of Officers who who had accompanied Mr.Panchal, P.S.I. when Bungalow No.19 was raided are mentioned in Panchnama(Exh.77). The said Panchnama was drawn by Mr.Parmar and Mr.Panchal, P.S.I. was one of the Officer alongwith Police Sub Inspector, Mr.C.N.Rajput and Mr.S.P.Oza, P.I., etc. The material part of the Panchnama (Exh.76 and Exh.77) requires to be proved by Mr.Parmar as well as Mr.Panchal, P.S.I. and the other Officers who were members of the raiding party. If idea was to implicate the accused No.1 in a serious offence then that exercise could have been done immediately on 4th February inst or during early hours of 5th February, 1993 by Mr.Zala or by

Mr.Parmar with Mr.Zala, Police Inspectors. So, the version of Prosecution Witness No.11 makes the prosecution case genuine.

37. One Police Officer, Mr.Brahmbhatt, who was in-charge of investigation for sometime has not been examined but it is clear from the evidence led by prosecution that he had not carried out the further investigation which can be said to be substantive in the nature.

38. Prosecution Witness No.12, Baburav Ramchandra Patil has been examined at Exh.121. He has deposed that in the year 1994-95 he was discharging his duty as Assistant Commissioner of Police, Ahmedabad Crime Branch. He has conducted the investigation of the offence registered on 11/6/1994 from Shri U.C.Brahmbhatt. Accused No.1-Abdul Wahab was in judicial custody in connection with other offence. He arrested original accused No.3. Accused No.4 is the owner of the Bungalow No.19. This witness had informed

the City Survey Officer to prepare the map of the bungalow but it appears that City Survey Officer had not cared to prepare the map formally otherwise he could have produced the said map alongwith charge-sheet, but the Court is of the view that production of such map would have added some more strength in the case of prosecution because the last portion of the Panchnama (Exh.77) is found satisfactorily proved to show that area used by the Victor Offset Printing Press was different than the Tushar Products, a a soap factory, as well as, area used as godown of Mahavir Glass Center. The fact disclosed by accused No.1 as to the ownership of Bungalow No.19 was required to be checked and verified and P.W.No.12 is the witness who had verified this aspect. Necessary documents were collected from the Municipal Corporation. Normally, as per law the contents of the last portion of the Panchnama describing the various parts of Bungalow No.19 ought not to have been read as a substantive piece of evidence but when document (Exh.22) has

been received in evidence at the instance of learned Counsel appearing for accused Nos.3 and 4 it is possible to read that part of the Panchnama though the contents mentioned in the last passage of Panchnama have not been specifically stated by the Officers who had drawn the Panchnama with Mr.Parmar, Police Inspector. Letter (Exh.122) written by Mr.Patil, Police Inspector describes these very detail which shows that one electric meter No.18005 was seen on the northern side wall of the bungalow and on the eastern side wall there was one window ad-measuring 3' x 4.5'. On the western side there was a shutter and there is a window on the northern side wall from there one can enter into the area of cellar. There was open parcel of land on the northern side but the same was covered by the compound wall. On the western side one shutter having sign board of Tushar Products Soap Factory and godown of Mahavir Glass Center referring as 19/3 Satyam Society and on the northern side the Victor Offset Press was located and it was there in the

same bungalow and the City Survey Superintendent was requested to mention the details of the name of the person who was owner of the cellar area on 5/2/1993. Meaning thereby there were compartments within the bungalow and one of the such part of cellar was consisting with large room in the cellar and where the press was installed. Electricity Bill produced by accused No.4 at Mark 'B' is in the name of Babubhai Manilal Shah. The customer number is materially different than the number mentioned in the letter Exh.122. It is also important to note that the Bill Mark 'B' tendered by accused No.4 clearly states that supply of electricity was discontinued since 24/11/1987, as the amount of Rs.913-94 Paise is due. As such Mark 'B' is not an electricity bill but the information supplied by Ahmedabad Electricity Company on demand. If the defence side has attempted to show that the press was working on the date of raid then it is possible to infer that the details reflected in Mark 'B' tendered by accused No.4 must be of some other

property. The Court is conscious that the prosecution cannot be permitted to rely on the weakness of the defence side but when evidence of P.W.No.12 is evaluated then the same simultaneously should be considered that whether the facts stated by P.W.No.12 is relevant. So the evidence of P.W.No.12 if is read in reference to the evidence of other Police Witnesses examined and witness examined from the Municipal Corporation then there is no confusion for arriving at the conclusion in accepting the say of prosecution that there is element of confusion as to the identity of the property which was raided or the evidence collected and led as to the ownership of bungalow No.19 and the ownership or occupancy of the area where the printing press was installed and area used as soap factory or Mahavir Glass are different than the area where the printing press was installed.

39. It has come on record that the area raided was occupied by accused No.4. Deposition

of Babulal Shah would have helped the prosecution but when there is documentary evidence and the accused No.4 himself has accepted that press was run by him in his statement recorded under Section 313 of the Code of Criminal Procedure, non-examination of Babulal Shah cannot be said to be infirmity. As it is mentioned earlier that in the statement recorded under Section 313 of the Code of Criminal Procedure, accused No.4 has not disputed that he was the occupant and user of the press. It would be convenient to reproduce the facts stated by accused No.4 in his statement recorded under Section 313 of the Code of Criminal Procedure.

> “I was detained under the PASA and during that period my wife had handed over the press to someone for running the press and no weapons have been seized from his press.”

This clearly indicates that occupancy of the area where the press was installed by accused No.4 was not a matter of serious dispute. The accused

No.4 has attempted to show that the person who was handed over the press by his wife may be the person responsible for the weapon seized. Undisputedly the accused has not examined his wife as defence witness because his wife had handed over the press to unnamed person is also not coming forth. In this background, the learned trial Judge was supposed to record its finding keeping in mind the scheme of Section 35 of the Arms Act. Section 35 contemplates about the criminal responsibility of a person in occupation of premises in certain cases. Undisputedly, a printing press was a business premises. There is nothing on record to show that after detention of accused No.4 in PASA, wife of accused No.4 was running the press. It will be difficult to presume either in favour of prosecution or against it in absence of any satisfactory explanation of the accused or the facts that have come on record during the evidence led by prosecution.

40. The learned trial Judge has observed that Prosecution Witness No.4-Kanuji Manuji was on duty at Tambu Chowky, Dariapur and in view of the facts that have emerged during the cross-examination of this witness makes the version of this witness as genuine and is also found from any other defects. This witness was serving as Constable with Boarder Wing and was not immediate sub-ordination of the Officers posted with Dariapur Police Station. It is not disputed that this Tambu Chowky false within the area under Dariapur Police Station or the arrival of Mr.Zala, P.I., may be a co-incident but it does not found improbable or planned arrival because neither Mr.Rajput (P.W.No.4) nor Mr.Zala, P.I., could have thought that accused No.1 is likely to pass through this Tambu Chowky area at a given date and time. The car was not intercepted due to involve in serious offence or illicit trafficking of arms and ammunitions. When Dariapur Police has registered the offence punishable under Section 185 of the Motor Vehicle

Act, the accused was supposed to arrest for commission of that offence because it was necessary to establish for Dariapur Police that Noor Mohmmed was found in a drunken condition and was not supposed to drive the vehicle. He was also found driving the car rashly so his detention in the Dariapur Police Station was obviously found natural and it is not possible for this Court to even observe that he was detained to plan out a serious case against him and other accused persons who have been prosecuted. True it is that the accused persons who was tried were asked to face a trial alongwith other accused persons with the charge of offence punishable under Section 120 (B) of the Indian Penal Code and five of them have been discharged by the Court and one accused person out of four, that is, original accused No.3 has been acquitted and conviction is not recorded by the learned trial Judge for the offence punishable under Section 120 (B) of the Indian Penal Code. The impugned judgment and order

therefore requires to be evaluated on the strength of the evidence led by the prosecution and the reasons assigned by the learned trial Judge while holding the accused guilty of the offence punishable under the Arms Act. So the fact of interception of Maruti Fronty Car and the arrest of accused No.1 in the first offence registered under Section 279 of I.P.C. and 185 of the Motor Vehicle Act is found established. True it is that there is nothing on record to show that ultimately Noor Mohmmed, that is, original accused No.1 was charge-sheeted for that offence or not, but according to this Court it would not be a matter of relevance because the facts of registration of earlier offence have not been seriously disputed even during the course of trial. No independent offence punishable under the Bombay Prohibition Act was registered but the offence punishable under Section 185 of the Motor Vehicle Act is an independent offence under which a person driving a motor vehicle in a drunken condition can be punished if is found guilty and

to bring home the charge of offence punishable under Section 185 of the Motor Vehicle Act, the prosecution is supposed to establish that while the person was driving the vehicle he was found in drunken condition.

41. When it is not the case of prosecution that Mr.Zala, Police Inspector had received secret information about the involvement of accused No.1 in any other serious offence punishable under the Arms Act, Mr.Zala has not actively participated in process of recovery of six cartridges from the cavity of the motorcar which was detained by him initially in earlier offence. So the car was searched again by Mr.Parmar in absence of Panchas on the secret information received by him. Technically the car can be said to be in custody of Dariapur Police Station and it was not easy for anybody including Mr.Zala, P.I. or Mr.Parmar, P.I., to plant six cartridges in a cavity. Therefore, the depositions of Mr.Zala, as well as, Mr.Kanuji

Manuji have been rightly believed as trustworthy piece of evidence by the learned trial Judge. The recovery of six cartridges from the Maruti Fronty Car is an initial recovery, if the prosecution case considered in its entirety. The area of Dariapur Police Station is well protected area having an entry gate and a compound wall. The possibility of access of anybody in the compound of the Dariapur Police Station has been ruled out by the answers given by the witnesses who were asked certain questions to that effect. On the contrary, it has come on record that no special guard was deputed on the car. It was parked about 10’ distance from the Santri of the Police Station. It is not the say of accused No.1 that he was taken out from the police station during night hours. Of course, Mr.Parmar, P.I., has not stated that when had he received secret information about original accused No.1 and original accused No.3 but on 5/2/1993 on account of information received by him, the decision to search the car was taken and Panchas

were called. This witness has stated that accused No.1 is involved in selling and transporting the arms and ammunitions and the information was specific that he had placed cartridges in the Maruti Car intercepted by Dariapur Police Station. It is very likely that some persons inimical to original accused No.1 and acquitted accused No.3 may have informed Mr.Parmar, P.I. about the activity of accused No.1 and 3 but when the information was specific, there is no way even for Mr.Parmar accept to search the car. It is in evidence that in all cases the car intercepted or detained are not search thoroughly. As the driver of the car was found in drunken condition the Dariapur Police Station may have ascertained in superficial manner whether any liquor bottle is there. There was no reason for Dariapur Police Station to take out speaker fixed on the rear seat of the car and when the Police had decided to search the car, the original accused No.1 may have given clue to the Police. The fact about the place where the

cartridges were kept falls in the category of facts which can be said to be in the exclusive knowledge of the accused No.1.

42. The Panchas have not supported the case of prosecution but there was no reason for the trial Court to disbelieve the say of Mr.Parmar that he was able to reach and take out the cartridges at the instance of accused No.1. The description of recovery of these six cartridges is mentioned in the Panchnama (Exh.94).

43. It is the experience of the society that cars found moving either without number-plate should mark with a sticker that owner applies for registration, but when the car is intercepted or seized in an offence, the driver is supposed to disclose the reason as to why the number-plate is not affixed on both the sides of the vehicles. Here, the Police reached to the conclusion on completion of the investigation that the Maruti Fronty Car intercepted in the offence was having

registration No.G.C.B. 122. As the accused No.1 was found driving the car without number-plate, he was the best person to disclose the fact that under what circumstances the car was without having any number-plate. So the person who took out the number-plate may be the original accused No.1. None of the persons have explained this contingency.

44. The Panch who has been treated as hostile and supported the case of prosecution even has stated that one Maruti Fronty Car was there in the compound of the Dariapur Police Station. The car was not bearing any number-plate is the say of more than one witnesses. The Panchnama corroborates (Exh.94) and the Panch Witness was not suggested by the defence Counsel who had decided not to support the case of prosecution that the Maruti Fronty Car was bearing a number-plate or the playing of a car without number-plate may be an independent offence punishable under the Motor Vehicle Act and the rules framed

there-under but it simultaneously speaks about the conduct of the person who was found plying the car without number-plate.

45. The accused No.1 has attempted to say this Court through the Counsel appearing that he was a simple driver and may not be aware about the presence of cartridges. It is also alternatively submitted that car was lying in a Police Station, nobody can put the cartridges in the cavity of the car. The cavity was not specially prepared but it was normally an hollow space prepared to fix up the speaker. It is very likely that Police may have planted those cartridges. All these are alternative defences that were taken. Till the date on which the car was intercepted and stopped by P.W.No.4, it was with accused No.2, so it is clear that accused Nos.2 and 1 both were responsible for plying the car without number-plate. Accused No.1 otherwise may have refused to accept the delivery of the car or to say that drive a car without number-

plate may put him to some difficulty. Driving a car without any number-plate is a circumstance against the accused persons, viz. No.1 and 2. It is true that circumstance is consistent to guilt but not inconsistent to the innocence. So the prosecution was supposed to bring mere evidence to establish that the car was plied without number-plate as it was being used in transporting prohibited ammunitions. Here the information received by Mr.Parmar and recovery of six cartridges from the car that has been found proved by the learned trial Judge becomes important. It was not possible for a layman to plant .455 revolver cartridges because ultimately the car was within the domain of Dariapur Police Station. So for the sake of argument if it is accepted that number of persons were passing in the Dariapur Police Station but it would not make the prosecution case doubtful because it is not easy to plant such cartridges, because such type of cartridges are not easily available in the market and in jail unless accused No.1 having

some animosity who was in the Police Station as the accused arrested in connection with offence registered on 4/2/1993. In the same way the Police would not plant six small cartridges in the cavity unless the officers were interested in creating the case to earn fame, otherwise the Police could have planted more number of cartridges including the prohibited ammunitions. So it is clear that the recovery of six cartridges from the cavity of the car as observed earlier is genuine recovery and in this background of fact plying of car without number-plate becomes circumstance which inconsistent to the innocence and consistent to the guilt.

46. When accused Nos.1 and 2 were defending themselves before the trial Court, their interest perhaps was conflicting and therefore only the original accused No.1 has submitted that he was a simple driver. He has no capacity to purchase the car and he was not aware about the cartridges that were lying. This was of course shown as

probability but when the accused No.2 proclaimed himself to be the owner of the car and there are documents on record to show that he had claimed the car, which would link him with accused No.1. If the accused No.2 has intended to sell the car to accused No.1 then he could have produced the statutory forms singed by both the parties, popularly known as “T.T. Form.” Some documents executed in this regard also could have been produced. The Court is conscious that ultimately the car was an immovable property and it does not require any formal documentation but Sales of Goods Act would also apply if one intends to transfer the car like other immovable property and sell would complete on acceptance of consideration and / or handing over the property between the understanding of sell. But the accused No.1 has never claimed that he is the owner of the car and accused No.2 has accepted that he is the owner of the car and as the amount of consideration was not paid to him by accused No.1, he being the registered owner acquired

custody of the car pending the litigation. Ultimately the car was given to him by way of an interim-arrangement, which cannot be said to be a claim of muddamal article. But it is difficult to accept that acquisition of car by accused No.2 pending trial was an innocence acquisition. The accused No.2 was conscious about his ownership. There is nothing on record to show that accused No.1 was his employee and the accused No.1 being a driver may have misused the car. This probability also does not emerge from the suggestions made to the prosecution witnesses otherwise father of the accused No.2 could have stated that in his deposition that original accused No.1 was the employee of his son as driver. When it appears that accused No.2 was responsible for knowing existence of the number-plate alongwith accused No.1 considering the time proximity of the alleged claim of the sell of car made by accused No.2, it will be difficult for the Court to say that the finding of the learned trial Judge is incorrect in linking the accused

No.2 with the six cartridges recovered from the car owned by him.

47. In the statement recorded under Section 313 of the Code of Criminal Procedure, accused No.2 has stated before the Court that he was not aware about the cartridges found from the cavity of the rear seat of the car. He has stated that he had not kept these cartridges in the cavity. According to accused No.2, the car was of the ownership of one Gangadhar. In his further statement recorded under Section 313 of the Code of Criminal Procedure, as mentioned earlier, he has claimed that accused No.2 was intending to purchase that car and he was party in the sale transaction being a broker because the sell was to be made through him. The sell transaction of the car was made on 4/2/1993 at about 11:30 a.m. Thereafter, the Police has recorded his statement on 12/2/1993. With this explanation he could have shown the document that on 4/2/1993 or at least a day earlier, the car was under the

ownership of Gangadhar. On the contrary, the documents given by the Regional Transport Authority reveals that the car was owned by accused No.2 without verifying the facts of ownership and when the physical custody of the car was not taken from accused No.2 the Court pending trial would not have handed the car to accused No.2. The accused No.2 had given the surety of Rs.50,000/- temporarily pending trial for custody of the car. The accused No.2 has attempted that he got the car released and was enjoyed the possession even thereafter is an inferable fact. The learned trial Judge has not ordered of confiscation of the car. In this fact situation the car found without number-plate in couple of hours after 11:30 a.m. on 4/2/1993 becomes the circumstance relevant and going against the accused No.2. Otherwise he could have stated in his statement that when he had handed over the car at 11:30 a.m., the car was with number-plate on both the sides. If accused No.1 was not known to him, accused No.2 would not have

handed over the car him owned by a third party viz., Gangadhar. The explanation given by accused No.2, if read in reference to the case of prosecution then it is possible to infer legitimately that accused No.1 may not be in acquaintance of accused No.2, otherwise the accused No.2 could not have waited till 12th February, 1993, the day on which his statement was allegedly recorded. On the contrary, he has claimed that he does not know any of the accused, meaning thereby he does not know even accused No.1 (Page No.189 and 191 of the paper-book).

48. So the finding of the learned trial Judge holding both the accused guilty of the charge of offence punishable under Section 25 (1) (a) of the Arms Act for indulging in and unauthorizedly keeping and transporting six live cartridges of . 455 live cartridges is legal. Here, on established facts the trial Court could have held accused No.2 guilty for recovery of six cartridges from his car by Police Inspector,

Mr.Parmar, because there is ample evidence to infer that the accused No.2 was conscious and aware about the presence of six cartridges that were being taken out by accused No.1. The motorcar cannot be said to be a premises but ultimately the vehicle from where the cartridges were found owned by accused No.2 and his admission indicates that till 11:30 a.m., on 4/2/1993, the car was under his complete control. He could have been held guilty in reference to recovery of prohibited cartridges in violation of the provisions of Arms Act and Rules framed there under establishing in the background of the scheme of Section 35 of the Arms Act, because ‘vehicle’ in the said Section would make him liable for the offence committed in the same manner as if it has been or is being committed him alone but the nature of offence and evidence as led the Court thought both the accused persons were responsible for the commission of the offence. It would be beneficial to quote the relevant Section 35 of the Arms Act from Chapter

IV.

49. The say of Mr.Raju, learned Counsel appearing for both the accused is that accused No.1 at least should not be linked with the prohibited arms recovered from Bungalow No.19. Because even as per the case of prosecution the accused No.1 had rightly led the raiding party to bungalow No.19 and on the clue given by accused No.1 that premises was raided. So the conviction of accused No.1 should be held bad so far as prohibited arms and ammunitions are concerned recovered from bungalow No.19. When the learned trial Judge has reached to a conclusion that accused No.2 is responsible for recovery of six cartridges from the car owned and occupied by him then, it is possible for the Court to infer reasonably that accused No.2 must be knowing the source of getting that cartridges.

49.1 The decision relied on by Mr.Raju in case of **Narsinhbhai Dahyabhai Vaghela (supra)** would

not help either accused Nos.1 or 2. In this cited decision there was no direct evidence against the accused and the prosecution had placed reliance upon circumstantial evidence and one of the circumstance was one fact about the place where the key was concealed. This Court while dealing with the evidence has observed that production and knowledge are different. According to Mr.Raju that unless it is either admitted or proved that accused No.1 was aware about the muddamal articles seized were concealed at a given place, he cannot be linked with the offence punishable under Section 25 (1AA) of the Arms Act. It is established by the prosecution by leading cogent evidence that accused No.1 was carrying six cartridges of .455 Revolver in a cavity of Maruti Car that was being driven by him and the car was of the ownership of accused No.2 and was being used for that purpose. If accused No.1 becomes instrumental in leading to the source place then the seizure of muddamal from source place obviously can be inferred to be

knowledge about the articles found concealed. This is not a case of bare recovery. In this cited decision the evidence of Panch (P.W.No.28) was that the accused had produced two keys. Out of one key of Godrej was taken possession by Police. Meaning thereby the accused was responsible in showing the place where the key was concealed and production of it. So, these judgment, keeping in mind such evidence led in present case on hand would not help any of these accused persons.

49.2 It is not possible for this Court to express agreement with the submission made by Mr.Raju, ld. Counsel that both these accused Nos.1 and 2 at least should be acquitted from the charge of offence punishable under Section 25 (AA) read with Section 35 of the Arms Act, because they may not be knowing about presence of prohibited fire arms viz., A.K. 47 Rifle and the prohibited ammunitions that could have been used in that very gun. This people may be guilty for

having conscious possession or some knowledge about six cartridges that were found from the cavity of the car owned by accused No.2 but it is the case of prosecution that accused No.1 is one of the main accused and only at his instance the Police was able to reach to the stock of varieties of cartridges, ammunitions and country made pistols and when the Court has observed that it was possible to infer that accused No.2 knew that his car is being used in the business of illegal trafficking / transporting prohibited arms and ammunitions then it is not possible for this Court to say that finding recorded by the learned trial Judge is erroneous and therefore say of Mr.Raju that other view than the view arrived at by the learned trial Judge could have taken is not accepted.

50. The report of ballistic expert (Exh.115) indicates that 50 cartridges were found in a sealed condition in Parcel ‘H’. and numbered as Exh.H1 to H50 and result of examination shows

(Page No.459 of the paper-book) that these cartridges were .45 revolver cartridges. In the same way the cartridges Exh.M1 to M13 were also of .45 revolver and they were fired cartridges. So, 13 fired cartridges and 50 live cartridges were found from Bungalow No.19 of Satyam Society and these cartridges were similar to the cartridges recovered from the motor car. The description given by the Expert in the result of examination is sufficient to infer and to record a conclusion that Exh.A1 to A6 recovered from motorcar were .45 Eley Revolver Cartridges and were live and other 50 cartridges (Exh.H1 to H50) were also live cartridges. Out of these total 50 cartridges H1 to H6, H13 to H26 and H41 to H50 were tested from standard .45 revolver. The percentage of misfired cartridges even if are compared so far as A1 to A6 and H1 to H50 then, it is safe for the Court that six cartridges which were found form the motor car were the part of stock found during the search of Bungalow No.19.

51. So the evidence of expert indirectly corroborates the seizure of six cartridges and the allegations made by prosecution that these six cartridges is the part of the stock of such or similar cartridges found from Bungalow No.19 gets sufficient strength. The acceptance of evidence of police witnesses by the learned trial Judge is not found either erroneous or perverse so far as accepting the case of prosecution in linking the accused Nos.1 and 2 with the cartridges found alongwith prohibited arms and ammunitions from Bungalow No.19. It is relevant to note that sealing procedure adopted by the concerned Officer has not been seriously challenged and therefore it is difficult for this Court to infer against prosecution that after recovery of prohibited arms and ammunitions six cartridges which were originally the part of material found at Bungalow No.19, was used to implicate the accused Nos.1 and 2 in the crime. The six cartridges were already sealed and

thereafter the Bungalow No.19 was raided. It is also clear that varieties of cartridges that were found from bag were classified and details were mentioned in the second part of the Panchnama. The details of the muddamal recovered from one part of Bungalow No.19 has been narrated by more than one witnesses including Mr.Parmar, P.I. All these muddamal articles have been identified by Mr.Parmar, P.I., as well as Mr.Panchal, P.S.I. Number of slips bearing signatures of Panchas received in evidence which speak itself, otherwise this Panch Witness could have clearly stated that all signatures were obtained in the Police Station only. Number of slips make this Court to believe that Panchas must be present at the time when each parcel sent to F.S.L., after obtaining their signatures. It was not possible for the raiding party to infer that how many slips would require for Panchas, if muddamal is really seized and recovered because varieties of cartridges and type of weapons recovered would require to be packed separately. So the seizure

of muddamal at one part of Bungalow No.19 is found genuine.

52. It is true that there is conflict in the evidence as to the mode of entry adopted by the raiding party in Bungalow No.19. If the door is found locked from inside then Police can adopt any proper method so that they can make entry into the Bungalow No.19. One Officer has stated that an iron grill of the size of 3' x 3' was taken out and another Officer has stated that iron door closed from outside was opened. Meaning thereby the door was opened as if it was locked from outside. It was not possible for Police to break the lock, if the Police does know or inform, otherwise there is no access in the area where the raiding party should reach on the clue given by the accused No.1 and they may not opt to open the door of the bungalow even if found locked from outside. As discussed earlier it is clear that Bungalow No.19 is divided in various compartments and out of that one

compartment was used as godown of Mahavir Glass Center, whereas one compartment was used as soap factory prior to some years. It is also in evidence that upper portion of the bungalow was used as residence. The cellar where the printing press was installed having its independent entry and one signboard was also found by the raiding party and details thereof are mentioned in the Panchnama. It is clear that the search team was intending entry only in the printing press area of the bungalow. So some inconsistency in evidence as to the mode of entry of Police Officer in the bungalow does not destroy the evidence. On the contrary the Police Witnesses are consistent that on a given date and time they entered into the basement of Bungalow No.19 of Satyam Society, which was consisting of a big room where one vault covered with iron door was found. Every witnesses does not describe the each details but are consistent on the fact of their entry and also the recovery of prohibited arms and ammunitions and other cartridges which were

live and used.

53. The Court should also think one another situation which emerges from the evidence qua the defence plea taken by the accused persons. If the Police Officers had intended to falsely implicate the accused persons then it was not easy for them to arrange and get various type of cartridges, including ammunitions used of A.K. 47 Rifle. This gives impression that the occupier or owner of the building had permitted to use the area under his domain to store all type of stocks so that the same can be supplied on demand and such demand can be satisfied with the help of persons like accused Nos.1 and 2, who can help the occupier or say person dealing in illegal storing and selling of such prohibited arms and ammunitions, etc. Thus the only Police Witnesses have supported the case of prosecution and none else and some independent witnesses could have been found out by the Investigating Agency, which does not go against the prosecution.

54. The learned trial Judge has placed reliance on certain decision which says that even conviction can be based on the evidence of Police Witnesses. It is not necessary for this Court to refer the decisions considered by the learned trial Judge again or to cite other decisions because it is settled legal position that the Court can place reliance on the evidence of the Police Witnesses and the conviction can be concurred on the evidence of Police Witnesses. The thing only which requires to be kept in mind that the Court accepting the evidence of Police Witnesses should be doubly sure about the genuineness of the version of such witness or witnesses. The cross-examination of such witnesses should be read with utmost care and the facts stated by the Police Witnesses should be cross-checked with other evidence oral as well as documentary in nature. While accepting the evidence of Police Witnesses as reliable piece of evidence, the Court can even consider the defence

of the accused and weakness of it. Because they are capable of providing circumstance. It is the experience of the Court that certain factual contingency are able to give rise to circumstance and one such contingency has been discussed herein above, that is, varieties of cartridges if are found at one place during one single raid and all of are found packed and sealed with different slips signed by the Panch Witnesses then it is possible for the Court to infer that the seizure must be genuine.

55. Non-examination of neighbour as witness would also not go against the case of prosecution. It is the experience of the society that nowadays nobody is practically interested as regards the activity going on to the next adjacent house. Even, if anything can be suspected, they are not keen to act as helping hand either to State or prosecuting agency. The neighbour at the most could have stated that because of imposition of curfew they were not

aware about the activities going on in the neighbouring bungalow. The Panchas could have selected from the very area but ultimately the distance between the Dariapur Police Station and the Satyam Society is not a big distance otherwise that fact could have come on record. Two Panchas were called and it is the case of prosecution that at the instance of accused No.1 six cartridges were recovered from the Maruti Car. When first part of the Panchnama was prepared at Dariapur Police Station at about 12:35 p.m. and names of the Officers who were to join the raiding party are also mentioned and this first part of Panchnama bears the signatures of Panchas. The first part of Panchnama (Exh.76) was over by 12:50 p.m. on 5/2/1993. Thus the Police activity had started at about 11:50 a.m. on 5/2/1993 and the procedure of completion of drawing second part of Panchnama at Bungalow No.19 was over by 15:00 hours. All slips signed by the Panchas bears the date and the signatures of the Officers in whose presence the Panchas

have signed. So merely because same Panchas were taken by Police does not make the search or seizure procedure ingenuine or otherwise doubtful. How the premises was relocked or whether it was kept open or was handed over to somebody when the raiding party had left the area of printing press of Bungalow No.19, are the questions that could have been answered by the prosecution but unless the prosecution is asked to explain this contingency, the prosecution was not supposed to tender such detail being not relevant to bring home the charge. If a locked or abandon premises are searched and Police does not intend to seal that premises then the Police obviously can leave that premises after completing its formalities. Same appears to have been happened in the present case. If the conduct of the Police is found strange leaving the premises abandon after carrying out the search and seizure, the genuineness of search and seizure would not be either bad or illegal in the eye of law. At the most the owner or occupant of

the premise may take appropriate steps either against the State or the Raiding Officer, if such conduct of the raiding party results into any loss or damage.

56. One more fact which rules out the possibility of planting of muddamal in a particular premises viz., the seizure of 122.5 Kg. Silver Wire. Nobody had claimed of such huge muddamal silver wire pending the trial. It was neither easy nor required for the Police to place silver wire in the huge quantity and therefore it appears that the learned trial Judge has observed placing reliance on the decision reported in case of **Karamjit Singh v. State (Delhi Administration) 2003 Cri.L.J. S.C. 2021** that, the evidence of Police Witnesses can be relied upon as discussed earlier. It appears that no serious attempts were made by prosecution to call Panch Witness No.1 and examined him being an important witness to prove the Panchnama drawn at Exh.76 and Exh.77. The closer pursis Exh.123 also does not

speak anything about the Panch Witness No.1. The learned Presiding Officer could have called the Panch Witness No.1 in exercise of powers vested with him under Section 311 of the Code of Criminal Procedure. But dropping of this witness is not objected when ld. Public Prosecutor decided to close the evidence then this infirmity is not found fatal to the case of prosecution. For the sake of argument, if the Court assumes that Panch Witness No.1 is examined and does not support the case of prosecution, then also, the learned trial Judge could have relied upon the evidence of Police Witnesses, mainly Mr.Parmar, Police Inspector and Mr.Panchal, Police Sub Inspector. The Public Prosecutor declared its satisfaction to the evidence led to bring home the charge and that is the language of closer pursis tendered in the Court vide Exh.123 and dropping of any of the witnesses including the Panch Witness No.1 has not been objected by any of the learned Counsel appearing for the accused and therefore, it cannot be said to be a material

infirmity.

57. The evidence led against the accused No.4 is mainly in the nature of documentary and circumstantial. It is difficult to believe that Police was not aware at all that the accused No.4 was under the orders of detention and accused No.4 was not even in city of Ahmedabad on the date of raid carried out by Dariapur Police Station on a discloser of a fact which was in the exclusive knowledge of accused No.1. A plain reading of the Panchnama reveals and it is also not the case of prosecution that any family member of the accused No.4 was present at the Bungalow No.19 when one of the part of Bungalow No.19 was raided, on the contrary it was locked. The warrant issued by the detaining authority clearly reveals that accused No.4-detenue was resident of Bungalow No.19, Satyam Society. It is legally inferable that the warrant under PASA must have been executed at the address shown in the order of detention. The learned trial Judge

has observed in Paragraph No.38 of the impugned judgment and order that the fact of occupancy of Bungalow No.19 of accused No.4 is an undisputed fact and this fact has been admitted by accused No.4 in his statement recorded under Section 313 of the Code of Criminal Procedure. In response of the query raised by the Court, learned A.P.P., Ms.Pandit, as well as, Mr.J.M.Panchal, learned Counsel appearing for original accused No.4 has informed that the order of detention was challenged in this Court by the accused No.4 but the same was ultimately upheld and therefore for long time the accused No.4 had remained in judicial custody. The fact of confirmation of the order of detention would not go against the accused. The document Mark 'A' produced by the accused No.4 along-with his explanation under Section 313 reveals that on 15/12/1992 the Commissioner of Police of City Ahmedabad had issued the order of detention under the PASA and he was released on 7/1/1994. Obviously, therefore on 5/2/1993 the accused No.4 was in the custody

under the order of detention. As discussed earlier, the bungalow No.19 was mainly used for commercial purpose and it was divided into various compartments. Sometime prior to the date of the raid the upper portion might have been used as residence, but on the date of raid the entire bungalow was found close is the evidence. One of the portion mentioned in the document Mark 'B' produced by accused No.4 must not be in active use, because it indicates that on 4/4/2004, that is, after the date of arrest of accused No.4, the Ahmedabad Electricity Company has certified that consumer No.180052 was to pay Rs.913-34 Paise and the electricity connection was disconnected since 24/11/1987. The name of consumer is shown as Babulal Manilal Shah. Name of Babulal Manilal Shah is also reflected in the document Exh.101, a person shown to be ultimately responsible to pay the tax on property No.2702/E/8. This document is for the year 1992-93. Each detail of document Exh.101 was not pointed out to the witnesses examined with a view

to prove this document. But for want of cross-examination and the document has been received in evidence without any objection from the accused side, the Court can read and consider the document as it is. The last column indicates the details as to recovery of the amount which is stated thus:

> “4250/B/1/1SP
>
> No.19 + “/19/1”/ and name of occupant is shown to be Mohmmed Rafik Sheikh, accused No.4.”

57.1 The assessment of tax is shown in two different columns and when it emerges that at least two parts were in exclusive occupancy of accused No.4 and his occupancy has not been disputed by accused No.4 himself and therefore non-examination of Babulal Manilal Shah as witness by prosecution would not be a matter of much relevance. Accused No.4 can explain the fact reflected in document Exh.101 and he could have stated that on the date of raid carried out by Police, who was occupying his portion of property when he was detained under the PASA. A

person found in conscious possession of the premises or occupancy is the person responsible to rebut the presumption that can be legitimately raised against such occupant considering the scheme of Section 35 of the Arms Act. The argument of Mr.Panchal is that learned trial Judge committed grave error in presuming conscious possession of the arms and ammunitions found from bungalow No.19. But, when it appears that there is no element of unfairness in the investigation or scope of planting of these unauthorized arms and ammunitions in the premises is found practically nil, the reasons assigned by the learned trial Judge in linking the accused No.4 with the crime is not perverse or illegal. True it is that the Police Witnesses have not fairly accepted that they were aware about the fact that accused No.4 was arrested under the order of detention. This fact could have been fairly accepted by prosecution. The Investigating Agency itself should have produced the order of detention as part of the charge-sheet especially

when the charge-sheet was filed under various Sections including Section 120 (B) of the Indian Penal Code and Section 35 of the Arms Act, but it is difficult for this Court to reach to an inference that non-discloser fact of detention of accused No.4 was a deliberate act to cause serious prejudice. The facts placed before the Court by prosecution that the accused No.4 was arrested under the transfer warrant on 7/10/1994 when the accused No.4 was an under-trial in one another case, is sufficient to observe that there is no deliberate suppression on the part of the prosecution that on the date of raid the accused No.4 was not a free bird. On the date of raid when the house was found in unused condition and there was no such activity in the area where the weapons were found, the accused No.4 can be linked with the crime. The delay in arrest of accused No.4 also would not be helpful. There was no need for any custodial interrogation of accused No.4 because ultimately the symbolic custody was taken and in that manner the accused

No.4 was arrested by Prosecution Witness No.12, Mr.Patil on 7/10/1994, meaning thereby after lapse of about nine months from the formal date of release mentioned in the release order issued by the State Government. So, the filing of the charge-sheet against the accused No.4 was considered to a formality.

58. The learned trial Judge has discussed the evidence as well as defence plea. It is true that prosecution has not come forward that when these arms were placed or stored in Bungalow No.19 and as such no investigation was carried out in that direction otherwise, the prosecution would have placed that evidence on record, but no suggestion was made to any of the Police Witnesses including Mr.Parmar, Mr.Patil or Mr.Panchal, who were the key officers in saying that accused No.4 is also responsible for the crime committed and that they had investigated in that direction and the evidence collected was indicative of the fact that this material was

stored or placed in Bungalow No.19 taking disadvantage of the absence of accused No.4. So, it is difficult for this Court to say that any prejudice is caused to the accused No.4 and the investigation has become unfair to him.

59. When it is in evidence that the two storied building was raided it was found close and nobody was inside the bungalow and the Police was compelled to make the entry though number of other entries. It appears from evidence that when more than one entry gates were there then why the particular iron door or grill was opened or broken open, is the question. This circumstance strongly supports the say of police witnesses that the act of raiding party was based on the fact came to the notice of Mr.Parmar, P.I. and other members of the raiding party, at the instance of and the facts disclosed by accused No.1, as alleged. This fact would be only in the exclusive knowledge of the person who is aware about the place where the prohibited arms,

ammunitions, etc. were stored or kept and it is legitimately inferable that only the person well known about the internal design and *inter-se* partition of the bungalow can point out that by opening a door or a grill the Police will be able to reach to the place where the prohibited arms and ammunitions were stored.

59.1 Here, the observations made and finding recorded by the Apex Court in case of **Narpalsing (Supra)** would help the case of prosecution. This would ultimately help the logic that has been applied by the learned trial Judge while accepting the evidence of Police Witnesses and believing the discovery of fact made by accused No.1. The relevant paragraphs No.23 to 26 are reproduced herein for the sake of convenience.

> *"23. Another comment made by the learned Sessions Judge was that Sadhu Ram had stated in his evidence that no article was recovered in his presence. This stray statement, in our opinion, is not sufficient to discredit the recovery of the three empties. Sadhu Ram when questioned*

about the recovered articles may not have in mind the recovery of the empties but some other material its like clothes, weapons etc. The Sessions Judge was, therefore, wrong in rejecting the recovery of three empties merely because of a stray statement made by P. M. 3 Sadhu Ram in his cross-examination. The High Court, while reversing the finding of the Sessions Judge on this point, has observed as follows :

> *"We do not find any defect in this evidence of the prosecution and the learned trial Judge in our view was on the wrong premises to reject this evidence."*

Perhaps the High Court has also not noticed that in one of the inquest reports the recovery of three empties is clearly mentioned, which in fact settles the controversy once for all. In these circumstances, therefore, we are of the opinion that the three empties from near the dead body of Sewa Singh had in fact been recovered on the night of the occurrence.

24. Again the recovery of the seven empties on the next day i.e., May 3, 1973, the Sessions Judge has disbelieved this part of the case for most perfunctory and unconvincing reasons. The Sessions Judge

seems to believe that since these empties were not recovered at night although the Investigating Officer searched for the same in the light of the torch and lantern, their recovery in the day must be deemed to be a fabrication. We are unable to agree with this fallacious process of reasoning. After all night, however lighted it may be, cannot be a good substitute for a day light or for the light of the sun. The empties were very small articles measuring about 1/2" to 1" and it is common experience that there are a number of small articles which one may not, with due diligence, be able to find even with the aid of a torch or electric light, yet they could be easily found in the day. In these circumstances, therefore, the reasons given by the learned Sessions Judge do not appeal to us at all and the High Court was right in reversing the finding of fact which was both wrong and perverse. In this connection, the High Court observed as follows :

> *"We do not find any element of untruth in this or any fabrication in the recovery of seven empty cartridge shells by Assistant Sub-Inspector Dev Dutt on the morning following the occurrence. The recovery of all the empty cartridge shells from two different places inspires confidence and we have no hesitation to accept this." The recovery of these seven*

empties is mentioned in seizure memo Ext. P. Y. and apart from P. W. 23 the Investigating Officer the recovery has been proved also by P. W. 19 Gurdial Singh who is an eye-witness and who has also been held by the Courts below to be an independent and disinterested witness. Both these witnesses have deposed on oath regarding the recovery of seven empties from the spot. Merely because other witnesses were not examined would be no ground to reject their evidence. We would, however, like to point out that in future the Investigating Officer should not associate any eye-witness with the recovery memos, because that partakes of an attempt to make the witness omnibus. For these reasons the recovery of three empties on the night of May 2, 1973 and seven empties in the morning of May 3, 1973, has been established beyond reasonable doubt and we see no reason to distrust the credibility of Exts. P. K. K. and P. Y. The recovery of the empties is a very important circumstances which fully corroborates the evidence of the eye-witnesses, taken along with the evidence of the Ballistic expert that some of these empties could have been fired from the guns sent to him.

25. We now come the recovery of the guns Exts. P. Z. 1 and P. A. A./1. According to the prosecution the appellant Jagmohan Singh made a disclosure statement to the Police Officer Nasib Singh in the presence of Kishan Singh Ex-Sarpanch that he was prepared to point out the gun which he had concealed at a particular place. This statement is Ext. P. A. A. and is witnessed by Kishan Singh. The accused was accordingly taken to the spot on May 25, 1973, and according to the evidence of Kishan Singh, who appears to be an absolutely independent witness and against whom no animus, though suggested, has been established, it is clear that the disclosure statement was made by accused Jagmohan Singh to Nasib Singh in his presence and the accused was taken and he recovered the gun from underneath the bushes standing on the old khal situated at a distance of 30 paces from the Forest Nursery in village Saunti. Similarly the witness deposed about the disclosure statement having been made to Nasib Singh Police Officer by accused Gurdev Singh at whose statement a gun was recovered from the bundle of wheat crop lying in a vacant piece of land. Nasib Singh has corroborated the testimony of Kishan Singh regarding the recovery of these two guns at the instance

of the appellants Jagmohan Singh and Gurdev Singh. The learned Sessions Judge rejected this statement mainly on two grounds, firstly, the learned Sessions Judge thought that Kishan Singh was merely a chance witness and he had no occasion to go to the police station and, therefore, his presence was doubtful, and secondly, the learned Judge took a serious note of a small discrepancy between the statement of Kishan Singh and that of the Police Officer Nasib Singh. According to Kishan Singh, Gurdev Singh made the disclosure statement in reply to the very first question, whereas according to Nasib Singh the accused had taken about half an hour to make the disclosure statement. Kishan Singh was not at all interested in the accused and there was no reason why he should have spoken a falsehood. Nasib Singh by saying that the accused took half an hour appears to have so stated in order to show that the disclosure was voluntary. This part of the statement of Nasib Singh may not be accepted and may have been deliberately introduced by way of pure embellishment but this does not destroy the fabric of evidence of an independent witness Kishan Singh. Being a police officer Nasib Singh may have thought that he should give to the case a colour of truth by providing him an opportunity of reflection on the part of the accused before he made a disclosure

statement. The fact, however, remains that the accused persons had been interrogated probably from May 23, 1973 and it was only after their conscience pricked them and they really felt penitent that they agreed to give a disclosure statement and recover the guns at their instance. Such a statement which is admissible under Section 27 of Evidence Act cannot be lightly brushed aside on trivial grounds given by the learned Sessions Judge. Furthermore, regarding Kishan Singh being a chance witness the Sessions Judge appeals to be factually incorrect. In his statement Kishan Singh says that he and Sardara Singh had gone to the police station to inquiry about the arrest of the accused persons. The Sessions Judge, however, relied on the statement made by Kishan Singh before the police which is Ext. D. F. at page 73 of the High Court Paper, Book. In this statement he merely stated that he had gone to the police station Ladwa by the way. His statement does not show that he was present only by chance or without any purpose. On the other hand his statement clearly shows that he had gone to the police station and was present there for some reason or the other when Gurdev Singh made the statement. Thus the learned Sessions Judge has misread the statement of this witness before the police as put to him in his cross-examination. Being a villager

one can fully understand the anxiety of the witness to find out whether the accused had been arrested, particularly because they were absconding for quite sometime. The High Court has also not considered the fact that the reasons given by the learned Sessions Judge are either factually incorrect or based on purely artificial appreciation of evidence of Kishan Singh and Nasib Singh. We, therefore, do not agree with the findings of the Sessions Judge and the High Court that the recovery of the guns evidenced by Exts. P. Z./1 and A. P. A./1 has been introduced or fabricated by the prosecution. If the recovery of the guns is believed, then it affords a substantial corroboration of the case of the accused persons' presence in the light of the report of the Ballistic expert.

26. Moreover, the courts below appear to have overlooked an important fact that the two guns had not been recovered from places which were open and accessible to all and sundry, but care had been taken by the accused to conceal in the bundle of wheat crop lying in a vacant field and in the bushes standing on the old khal in the forest so that even with the greatest possible care the police would not have been able to recover these weapons unless clues

were furnished by the appellants Jagmohan Singh and Gurdev Singh themselves. This circumstance by itself appears to be a sufficient guarantee of the truth the authenticity of the recovery of the guns referred to above."

59.2 True it is that the facts of this cited decisions are bit different but it is relevant to note that ultimately the Apex Court decided to remit the case back to the Sessions Court to hear the question of sentence only.

60. When accused No.4 has not disputed the occupancy of Bungalow No.19 of Satyam Society then his absence from the premises since long would help the accused and go against the prosecution, is also one question posed before this Court. The accused No.4 has been held guilty of the charge of offence punishable under Section 25 (1AA) read with Section 35 of the Arms Act. The citation relied on by the learned A.P.P., are the cases under the Opium Act, 1878 (Now repealed by the N.D.P.S. Act, 1985).

Section 10 of the Opium Act, 1878 which provides presumption in prosecution under Section 9 of the Opium Act, 1878. No such presumption is drawn in the Arms Act. Section 35 of the Arms Act provides for criminal responsibility of a person of premises, vehicle or other place, but the words “unless contrary is proved” used in Section 35 creates the situation and it makes the accused liable to explain the contingency if the prosecution is able to establish the possession or occupancy of a particular premises or vehicle or a place that of the accused. As observed earlier, the accused No.2 was responsible for his ownership and conscious constructive possession of the motor car from where six live cartridges were found and recovery of six live cartridges led the Police to Bungalow No.19. Now there is sufficient evidence including the admission made by accused No.4 himself that he was occupier of Bungalow No.19. The printing press was run by accused No.4 and has explained that after the execution of order of detention, his wife had

handed over the press to somebody but name of somebody has not been disclosed. If a running business could have been handed over to somebody without any formal writing or agreement, it contemplate inter-se obligation of accused No.4 and that unknown person. The vagueness in the explanation of the accused speaks equally to the falsity of the defence and it can be used by prosecution while showing its strength and that was shown by the prosecution when the matter was argued before the learned trial Judge and before this Court.

61. The judgment relied on by Mr.Panchal, if closely read, including the part that was read over to the Court by Mr.Panchal from paragraph 5 of **Gunvantlal (Supra)**, the ratio would help the prosecution and not to the accused because the prosecution was under obligation to establish the actual physical possession and the presence of accused on the spot.

61.1 In one case of **Pabitar Singh Vs. State of Bihar, reported in A.I.R. 1972 S.C. 1899**, the Supreme Court acquitted the sole accused who was charge-sheeted as he was found present in a quarter and a gun was recovered. In this case a gun was recovered from a room of a quarter which was in possession of two persons and one of them was not present at the time of raid. The Apex Court has said that mere presence of the other in that room, was not sufficient to make him guilty of the offence punishable under Section 35 of the Arms Act. The ratio of the decision says that there should be some evidence under which the Court can reasonably believe that he, that is, person prosecuted, was aware about the existence of the gun in that room. But the facts of the present case are materially different. The premises raided was a commercial premises and the same was found located at the time of raid and no other evidence is on record to show that somebody was placed / engaged in managing the affairs of the printing press occupied by accused No.4. The

prosecution is entitled to prove that actual or physical possession but can submit that the accused is guilty of having constructive possession of the arm in violation of the scheme provided under the Arms Act. Some control or domain over the fire arm if is emerging from the evidence then constructive possession can reasonably inferred. Such an inference cannot be equated with any surmises. So, the observations made by the Apex Court in case of **Gunvantlal (Supra)** would help the prosecution.

62. The first pre-condition to bring home the charge of offence punishable under Section 25 (1) (a) or 25 (1AA) is the element of intention, consciousness or knowledge with which the persons possessed fire arm, that possession need not be physical possession but can be constructive, having power and control over such arm or ammunitions. It was possible for the accused to come out from the charge by placing concrete facts that the explanation given that the part of

the property which was raided was actively used by placing the proof as to the activity undertaken by Offset Printing Press. However, the accused has attempted to mislead the Court by producing one documentary evidence in the form of certificate issued by the Ahmedabad Electricity Company which on the contrary shows that the premises mentioned in that document had no power supply till 1987. On the other hand the circumstances speaks and is not even a matter of dispute that the accused was in occupancy and was in use of Bungalow No.19 till the date on which he was detained under the PASA. Whether the accused was using the premises without any electricity connection, is the question. The answer would obviously be in negative. A prudent man can infer this and such inference cannot be equated either conjunctures or surmises. So the constructive possession of Bungalow No.19 has been satisfactorily proved. If the argument advanced by Mr.Panchal is accepted that because of absence of accused No.4 from his bungalow

No.19 since long and the prosecution has not placed the papers of his order of detention alongwith the charge-sheet and the accused No.3 who has been named as person concerned with Bungalow No.19, the knowledge or consciousness as to the use of premises occupied by accused No.4 should not be attributed. It would be difficult to bring home the charge against any person who is able to prove that he was away from his property since long and therefore even his constructive possession of the premises also should not be believed from where the prohibited substance or arms or ammunitions are found. Such evidence can be brought in the nature of entry in passport and one can claim that he was out of country and therefore not responsible for the material found from his residence or locked business premises. One Police Officer has stated that the press was working and employees were employed but the muddamal was recovered from a vault covered with iron-sheet which was situated in the cellar of the bungalow No.19 and it is

clear that actual press activity was not going on and as per the accused, proof from the Ahmedabad Electricity Company is in relation to the premises which was raided then it rules out the possibility that the press was actually running. To keep the machinery in working condition or in manageable condition would not absorb the owner of the property from a liability merely because the owner or occupier is not physically present.

62.1 In case of **Kailash Chandra Sahu v. Republic of India, reported in AIR 1985 SUPREME COURT 1672**, about 665 grams of opium was recovered from the shop and a servant was present and the defence taken by the accused was that merely the licence of the shop is in the name of appellant-accused, he could not be held responsible for anything recovered from the shop. Meaning thereby certain persons including the servant persons had an opportunity to enter into the shop and undisputedly the owner / licencee of the shop was not present when the search was

carried out and the opium was seized.

63. In case of **Inder Sain v. State of Punjab, reported in AIR 1973 SUPREME COURT 2309**, a point relevant in present case is discussed. In this cited the decision the arguments are identical to the arguments made by Mr.Panchal in the present case that the prosecution has not proved beyond doubt that accused was not in actual physical custody or under conscious possession of the articles seized from his bungalow. However, the accused No.4 was not really aware and somebody else was in control of the bungalow, may be the accused No.3 or wife of accused No.4 or the person to whom the printing press was allegedly given for running the business, then the explanation would not have been of such vague nature. When the accused No.4 has admitted that once he was in possession / occupancy of the premises raided upto the date he was detained and was also conscious that what had happened to his business of printing press, he was under the

obligation to satisfy the Court that he has been wrongly linked with the crime applying Section 35 of the Arms Act by the learned trial Judge.

64. As the six cartridges were found identical to the cartridges found from Bungalow No.19 by the raiding party, the prosecution can positively argue that this Court can infer that somebody may have entered and reached to the vault for taking out the stock of some cartridges lying there and unless the occupant-accused No.4 permits nobody would have entered into the premises and to grant such permission or to accord sanction, physical presence of accused No.4 was not at all required. That prior to the date of order of detention on account of understanding arrived at between the accused No.4, rather accused Nos.1 or 2 or some unknown person might have taken out these six cartridges for making use of it. So, the absence of accused No.4 in the bungalow No.19 or his presence in the prison would not automatically absorb him from

the criminal liability made punishable under Section 35 read with Section 25 and with other relevant sections of the Arms Act. True it is that case of prosecution was that accused No.3 is mainly indulging in such activity and was doing the illegal business of arms and ammunitions with accused No.1. On account of inadequacy of evidence, the accused No.3 has been acquitted but his acquittal itself is not sufficient to dislodge the inference drawn by the learned trial Judge that accused No.4 being the occupant of the premises can be said to be in constructive and conscious possession of the muddamal arms and ammunitions recovered from his bungalow. So, it is difficult for this Court to express the agreement with the submission made and argument advanced by Mr.Panchal that the finding arrived at by the learned trial Judge is erroneous, perverse and contrary to the accepted principles of law.

65. True it is that accused Nos.3 and 4 were

defended by the common lawyer before the learned trial Judge but this fact would not make him entitle to draw any inference. But, at least it is possible to observe that accused Nos.3 and 4 were of the view including the lawyer appearing for them that there is no conflict of interest so far as defence is concerned keeping the charge framed in mind.

66. Despite of preferring separate appeals before this Court, the accused Nos.1 and 2 have placed their case through a common lawyer though they were separately defended themselves before the trial Court. They had taken some conflicting defence before the trial Court impliedly alleging against each other and now both these accused persons have made submissions jointly saying that they have been wrongly linked with the crime. If their defence before this Court should consider transparently, it is nothing but a case of denial and false implication, agitating that anybody may have planted six cartridges in the cavity of the

car owned by accused No.2 otherwise the same could have been recovered on 4th February inst. But as observed earlier this argument is found not convincing and therefore it is not possible for this Court to say that the order of conviction and sentence recorded by the learned trial Judge is illegal, bad or otherwise unsustainable in the eye of law.

67. In the present case it is possible for the Court to observe that this Court is in agreement with the basic reasons given by the learned trial Judge for linking the three accused with the crime and this Court can adopt the reasons assigned by the learned trial Judge, but these three appeals are preferred under the provisions of Section 374 read with Section 386 of the Code of Criminal Procedure and by undertaking the exercise of re-appreciating the entire set of evidence, the Court reaches to the conclusion that it is not possible for the Court to say that the conviction and sentence recorded

by the learned trial Judge is either bad, illegal or unsustainable in the eye of law.

68. In view of the aforesaid discussion and the observations made and on evaluation of evidence a fresh, the present three Criminal Appeals are thus hereby dismissed. The conviction and sentence recorded by the learned City Sessions Judge, Court No.11, Ahmedabad City disposing two Sessions Case No.46 of 1999 and Sessions Case No.190 of 2000 on 23rd April, 2004 is hereby confirmed.

68.1 At present the original accused Nos.1 and 2 are in prison; whereas the original accused No.4-appellant of Criminal Appeal No.912 of 2004 is on bail pending hearing and final disposal of the appeal and therefore the accused No.4 should be given some reasonable time to surrender, because he would have to make certain arrangement for his family members, etc., he is given six weeks time to surrender before the trial Court

from today. The appellant-original accused No.4 is, therefore, directed to surrender himself before the concerned trial Court on or before 22/10/2007 to serve out the sentence, failing which the trial Court shall issue non-bailable Warrant to secure the presence of original accused No.4 so that he can be sent to Jail to serve the sentence. Bail Bond of the original accused No.4 stand discharged/cancelled. Order and Direction accordingly.

(C.K.BUCH, J.)

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